MEGAT NAJMUDDIN DATO' SERI (DR) MEGAT KHAS

v.

BANK BUMIPUTRA MALAYSIA BHD

FEDERAL COURT, KUALA LUMPUR
WAN ADNAN ISMAIL CJ (MALAYA)
STEVE SHIM CJ (SABAH & SARAWAK)
ABDUL MALEK AHMAD FCJ
AHMAD FAIRUZ FCJ
MOHTAR ABDULLAH FCJ
[CIVIL APPEAL NO: 02-8-2001(W)]
8 FEBRUARY 2002
[2002] CLJ JT(2)

CIVIL PROCEDURE: *Appeal - Jurisdiction to entertain - Whether Federal Court has jurisdiction to determine appeal on procedural rules of Court of Appeal - Courts of Judicature Act 1964, s. 96(a) - Prejudice to appellant - Whether Federal Court has inherent powers to prevent injustice - Federal Constitution, arts. 121(2), 128(3) - Rules of the Federal Court 1995, r. 137*

CIVIL PROCEDURE: *Appeal - Record of appeal - Incorporated photocopy of sealed order appealed from - Supplementary record of appeal incorporating sealed copy of order filed out of time and without leave of court - Whether there was non-compliance with r. 18(4)(d) and (7) Rules of the Court of Appeal 1994 - Whether there was compliance when sealed copy thereof was tendered at appeal hearing in accordance with Supreme Court Practice Direction No. 1 of 1992*

CIVIL PROCEDURE: *Rules of court - Non-compliance - Whether curable - Rules of the Court of Appeal 1994, rr. 18(4), (7), 102 - Rules of the Federal Court 1995, r. 137*

CIVIL PROCEDURE: *Jurisdiction - Federal Court - Inherent jurisdiction of court - In what circumstances can it be invoked - Rules of the Federal Court 1995, r. 137*

CIVIL PROCEDURE: *Rules of procedure - Practice direction - Conflict with rules of court - Effect thereof - Supreme Court Practice Direction No. 1 of 1992 - Rules of the Court of Appeal 1994, r. 18(4)(d), (7)*

CONSTITUTIONAL LAW: *Courts - Jurisdiction of Federal Court to determine appeals from Court of Appeal - Federal Constitution, art. 121(2) - Whether subject to art. 128(3) Federal Constitution - Courts of Judicature Act 1964, s. 96(a)*

This appeal arose as a result of the Court of Appeal's decision to dismiss the appellant's appeal therein on the defectiveness of the appeal record. The facts were that the appellant had appealed to the Court of Appeal against the decision of the learned judge of the High Court. The respondent raised a preliminary objection, *ie*, that the appellant had not complied with r. 18(4)(d) and (7) of the Rules of the Court of Appeal 1994 ('RCA') as the appeal record included only a photocopy of the sealed order appealed from, and that the supplementary appeal record that incorporated a sealed copy of the order was filed out of time and without leave of court. The Court of Appeal upheld the preliminary objection and dismissed the appeal. Hence, this appeal.

The two questions before the Federal Court were: (1) whether the Federal Court had jurisdiction to determine this appeal from the Court of Appeal as it did not originate from the High Court in respect of any civil cause or matter decided by the High Court in the exercise of its original jurisdiction; and (2) whether there was compliance with r. 18(4)(d) and (7) RCA when the appellant tendered the sealed copy of the order at the hearing before the Court of Appeal in open court in accordance with the Supreme Court Practice Direction No. 1 of 1992 ('the practice direction').

Held:

Per Steve Shim CJ (Sabah & Sarawak) (majority)

[1] Article 121(2) of the Federal Constitution ('the Constitution') is an empowering provision which states that the Federal Court shall have jurisdiction to determine appeals from decisions of the Court of Appeal and the High Court. If it was the intention of Parliament to confer jurisdiction on the Federal Court to hear appeals from all decisions of the Court of Appeal, the word "all" or "any" would have been included therein. Therefore, it was intended that not all decisions are appealable. Furthermore, art. 128(3) of the Constitution states that the jurisdiction of the Federal Court to determine appeals from the Court of Appeal, a High Court or a judge thereof shall be as provided by federal law. There is no dispute that the Courts of Judicature Act 1964 ('CJA') is the federal law envisaged in the said article. (pp 660 h-i & 661 a-b)

[2] It is abundantly clear that s. 96(a) CJA confers no jurisdiction on the Federal Court to determine appeals from any judgment, order or decision of the Court of Appeal unless such judgment, order or decision is in respect of any cause or matter decided by the High Court in the exercise of its original jurisdiction. It is within this perceptibly narrow confine that an appellant must ventilate his case. From that perspective, the answer to the first question had to be in the negative. (pp 661 i & 662 a-b)

[3] The decision to dismiss by the Court of Appeal was grounded essentially on the defectiveness of the appeal record and nothing else. Therefore, the order or decision of the Court of Appeal did not fall within the ambit of s. 96(a) CJA. (p 662 f-h)

[4] The Federal Court has been conferred with inherent powers under r. 137 Rules of the Federal Court 1995 to prevent injustice. In addition, the Federal Court has the inherent jurisdiction under the common law to deal with cases with a view to preventing injustices in limited circumstances. This is clearly in line with s. 3(1)(a) Civil Law Act 1956 which was promulgated in accordance with cl. (c) of art. 121(2) of the Constitution which confers on the Federal Court "such other jurisdiction as may be conferred by or under federal law". (p 663 b-d)

[5] Practice directions were effected for administrative purposes. Parliament could not have contemplated that practice directions can be issued in direct conflict with procedural rules of court which have been statutorily laid down. To that extent that such practice directions are in conflict, in the sense of superseding or deviating substantially from statutory rules of court, they are of no legal effect whatsoever. It is trite, however, that once practice directions have been properly and legally issued, they must be complied with. (p 665 d-g)

[6] The alternative requirement in the Court of Appeal Practice Direction No. 1 of 1995 (a modified version of the Supreme Court Practice Direction No. 1 of 1992) allows the appellant to tender a copy of the judgment, decree or order appealed from on the day of the hearing of the appeal in open court. It does not oblige the appellant to comply with the conditions set out in r. 18(7) RCA which stipulates that all relevant documents in the record of appeal have to be filed at the registry "within six weeks after the entry of the appeal or within such further time as the court may allow." It has the effect of superseding or deviating substantially from those conditions and therefore, is in conflict with r. 18(7) RCA. As such, it cannot have any legal effect whatsoever. In the circumstances, the appellant on tendering a sealed copy of the order appealed from on the hearing of the appeal in the Court of Appeal did not comply with r. 18(4) and (7) RCA. (pp 665 h-i & 666 a-b)

[7] Notwithstanding the above, the non-compliance of the rules was curable under r. 102 RCA. Had the Court of Appeal considered r. 102 RCA, it would have taken note of the following salient facts: that there was no dispute as to the contents of the order appealed against; that the appellant had already filed and served the appeal record containing a photocopy of the sealed order; that the authenticity of the photocopy of the sealed order was not in dispute; that the appellant had also filed and served the

supplementary appeal record containing a certified true copy of the sealed order; and that the appellant had tendered a certified true copy of the sealed order at the hearing of the appeal in open court. Given those factual circumstances, the respondent had neither been misled nor prejudiced in any way notwithstanding the defect. (p 666 c-g)

[8] The Court of Appeal's failure to consider r. 102 RCA had adversely affected its decision in upholding the preliminary objection of the respondent. On that basis, its decision was therefore flawed resulting in injustice to the appellant. Therefore, this was a fit and proper case to invoke the inherent power of the court under r. 137 Rules of the Federal Court 1995 in preventing such injustice. (p 666 h)

Per Abdul Malek Ahmad FCJ (majority)

[1] Rule 18(4)(d) RCA clearly states that the appellant shall attach to the memorandum of appeal a copy of the judgment, decree or order appealed from. Since a copy of the judgment had in fact been tendered, that rule had been complied with. (p 680 f-h)

[2] Rule 18(7) of the RCA provides that the record of appeal shall be filed at the registry within six weeks after the entry of the appeal or within such future time as the court may allow. Since a copy of the judgment had been included in the record of appeal, and since it was filed within the three weeks allowed from the date of receipt of the notes of evidence and the grounds of judgment, there could not be any doubt that the record of appeal was in order. (pp 680 i & 681 a)

[3] It was crystal clear that the appellant had followed the Supreme Court Practice Direction No. 1 of 1992 to the letter. Practice directions have the force of law as they are made under the relevant rules, *ie*, r. 77 of the RCA and r. 138 of the Rules of the Supreme Court 1980 which the present facts of this case were governed. In fact, even with that being repealed by the Rules of the Federal Court 1995, r. 110 thereof has a similar provision. (pp 681 c & 682 a-c)

[4] The record of appeal was in fact in order as there was already a copy of the grounds of judgment enclosed therein and the appellant had duly complied with the relevant practice direction which had the force of law. Therefore, the answer to the second question would be in the positive. The answer to the first question would be in the negative as it went against the grain of s. 96 of the CJA and the decided authorities. (p 682 d-e & h)

Per Ahmad Fairuz FCJ (dissenting)

[1] The decision of the Court of Appeal was a matter pertaining to the rules of procedure of the Court of Appeal. The matter of non-compliance with the RCA is not a cause or matter decided by the High Court within s. 96(a) CJA. (p 683 f-h)

[2] Article 121(2) of the Constitution must be read subject to art. 128(3) of the Constitution. Article 128(3) clearly states that the jurisdiction of the Federal Court to determine appeals from the Court of Appeal shall be such as provided by federal law. The CJA is such federal law. Section 96(a) CJA is plain, clear and unambiguous. As the subject matter of this appeal was clearly outside the ambit of s. 96(a) CJA, the Federal Court had no jurisdiction to determine this appeal. It followed, therefore, that the second question would not be considered. (pp 685 f-g, 686 i & 687 a-b)

Per Mohtar Abdullah FCJ (majority)

[1] The judge should be mindful of r. 102 of the RCA which provides that non-compliance with the Rules of the Court of Appeal or with any rule of practice for the time being in force shall not render any proceedings void. The said rule also provides for the discretionary power of the judge to deal with such irregularity in such manner and upon such terms as the judge thinks fit. (p 690 b)

[2] Rule 18(7) RCA itself provides an avenue for the appellant to apply to the court for extension of time. If the appellant fails to do so, he should not be peremptorily dismissed. The court should consider why the appellant acted in the manner he did. In the present case, the appellant was relying on the Court of Appeal's own practice direction which allowed alternative procedures for the filing or submission of the copy of the court order appealed against. The Court of Appeal should properly examine its own practice direction and consider the matter in the light of the RCA as modified by the practice direction. (p 690 c-d)

[3] The strict procedural requirements of r. 18 RCA have been mitigated by the Court of Appeal Practice Direction No. 1 of 1995 (adopting and modifying the Supreme Court Practice Direction No. 1 of 1992). The practice direction provides that as soon as the appellant receives the sealed order from the High Court, the said order can be filed as a supplementary record of appeal without any necessity to file an application to submit it as a supplementary record of appeal. The phrase "as soon as the appellant receives the sealed order from the High Court" does not come within any qualifying time frame. The alternative procedure in the practice direction allows the appellant to submit a copy of the judgment, decree or order appealed against on the day of the hearing of the appeal in open court. (pp 690 e, i, 691 a-b, & g-h)

[4] Practice directions are directions for administrative purposes and have no statutory authority. They help to clarify or highlight existing rules for proper compliance of the said rules as set out in the relevant court rules or the relevant Acts of Parliament. However, this particular Court of Appeal Practice Direction No. 1 of 1995 goes beyond its administrative purview as it provides for substantial deviations from the strict procedural rules set out in r. 18 RCA. The fault lies with the framers and issuer of the practice direction. A rule of court cannot be amended by an administrative direction. Rule 18 should have been modified and amended accordingly to accommodate the two alternative procedures sought to be introduced by the practice direction. (p 692 a-c)

[5] It is clear that practice directions with no statutory authority cannot supersede the relevant court rules or the relevant Acts of Parliament. But where, as in the present case, the existence of the practice direction and its reliance or compliance by a litigant leads to the litigant being punished for the same, then the judge or court should exercise judicial discretion to prevent injustice. (p 692 d-e)

[6] The Court of Appeal was clearly wrong in upholding the preliminary objection by the respondent that the appellant had failed to obtain leave to file the supplementary record of appeal out of time. The order of striking out the appeal with costs was erroneous. It followed, that the second question should be answered in the positive. In view of that, there was no necessity to specifically answer the first question. This was a clear case where injustice had been done to the appellant who had been denied his right to have his appeal heard on its merits. This court has the inherent power to hear any application or to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the court (r. 137 of the Rules of the Federal Court 1995). (p 692 f-h)

[Appeal allowed by majority; case to be remitted to Court of Appeal for hearing on merits.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Rayuan ini berbangkit akibat keputusan Mahkamah Rayuan untuk menolak rayuan perayu atas ketidak-sempurnaan rekod rayuan. Fakta-faktanya adalah perayu telah merayu kepada Mahkamah Rayuan terhadap keputusan hakim Mahkamah Tinggi yang bijaksana. Responden telah membangkitkan bantahan awal, iaitu bahawa perayu telah tidak mematuhi k. 18(4)(d) dan (7) Kaedah-Kaedah Mahkamah Rayuan 1994 ('KMR') kerana rekod rayuan memasukkan hanya salinan fotostat perintah yang telah dimeterai terhadap yang mana dirayu, dan bahawa rekod rayuan tambahan yang menggabongkan salinan perintah

tersebut yang telah dimeterai telah difailkan di luar masa dan tanpa kebenaran mahkamah. Mahkamah Rayuan mempertahankan bantahan awal dan menolak rayuan tersebut. Dengan itu, menyebabkan rayuan ini.

Dua soalan di hadapan Mahkamah Persekutuan adalah: (1) sama ada Mahkamah Persekutuan mempunyai bidangkuasa untuk menentukan rayuan ini daripada Mahkamah Rayuan kerana ianya tidak berasal daripada Mahkamah Tinggi berhubung sebarang kausa sivil atau perkara yang diputuskan oleh Mahkamah Tinggi dalam perlaksanaan bidangkuasa asalnya; dan (2) sama ada berlaku pematuhan akan k. 18(4)(d) dan (7) KMR ketika perayu mengemukakan salinan perintah yang telah dimeterai di perbicaraan di hadapan Mahkamah Rayuan dalam mahkamah terbuka menurut Arahan Amalan Mahkamah Agong No. 1 Tahun 1992 ('arahan amalan tersebut').

Diputuskan:
Oleh Steve Shim HB (Sabah & Sarawak) (majoriti)

[1] Artikel 121(2) Perlembagaan Persekutuan ('Perlembagaan tersebut') adalah peruntukan yang memberi kuasa yang mana menyatakan bahawa Mahkamah Persekutuan mempunyai bidangkuasa untuk menentukan rayuan-rayuan daripada keputusan-keputusan Mahkamah Rayuan dan Mahkamah Tinggi. Jika ianya merupakan niat Parlimen untuk memberikan bidangkuasa ke atas Mahkamah Persekutuan untuk mendengar rayuan-rayuan daripada kesemua keputusan-keputusan Mahkamah Rayuan, perkataan "kesemua" atau "mana-mana" tentunya telah dimasukkan di dalamnya. Oleh itu, adalah diniatkan bahawa bukan kesemua keputusan boleh dirayui. Lagipun, art. 128(3) Perlembagaan tersebut menyatakan bahawa bidangkuasa Mahkamah Persekutuan untuk menentukan rayuan-rayuan daripada Mahkamah Rayuan, Mahkamah Tinggi atau hakimnya hendaklah seperti yang diperuntukkan oleh undang-undang persekutuan. Tidak dipertikaian bahawa Akta Mahkamah-Mahkamah Kehakiman 1964 ('AMK') adalah undang-undang persekutuan yang dirujukkan di dalam artikel tersebut.

[2] Adalah amat jelas bahawa s. 96(a) AMK tidak memberikan sebarang bidangkuasa ke atas Mahkamah Persekutuan untuk menentukan rayuan-rayuan daripada mana-mana penghakiman, perintah atau keputusan Mahkamah Rayuan melainkan penghakiman, perintah atau keputusan yang sedemikian adalah berhubung dengan sebarang kausa atau perkara oleh Mahkamah Tinggi dalam melaksanakan bidangkuasa asalnya. Di dalam lingkungan ketetapan sempit yang nyata ini, perayu mesti menyuarakan kes beliau. Daripada perspektif itu, jawapan kepada soalan pertama tentunya dalam bentuk negatif.

[3] Keputusan untuk menolak oleh Mahkamah Rayuan berasaskan ketidak-sempurnaan rekod rayuan dan tidak lain. Oleh itu, perintah atau keputusan Mahkamah Rayuan tidak jatuh di dalam lingkungan s. 96(a) AMK.

[4] Mahkamah Persekutuan telah diberikan kuasa-kuasa sedia ada di bawah k. 137 Kaedah-Kaedah Mahkamah Persekutuan 1995 untuk menghalang ketidak-adilan. Tambahan pula, Mahkamah Persekutuan mempunyai bidangkuasa sedia ada di bawah common law untuk menguruskan kes-kes bagi mencegah ketidakadilan dalam keadaan-keadaan yang terhad. Ini jelas sejajar dengan s. 3(1)(a) Akta Undang-Undang Sivil 1956 yang mana telah diumumkan menurut fasal (c) per. 121(2) Perlembagaan tersebut yang memberikan ke atas Mahkamah Persekutuan "bidangkuasa sedemikian yang lain sepertimana yang diberikan oleh atau di bawah undang-undang persekutuan".

[5] Arahan-arahan amalan dikuatkuasakan bagi tujuan pentadbiran. Parlimen tidak bertujuan arahan-rahan amalan dikeluarkan bercanggahan dengan kaedah-kaedah prosedur mahkamah yang telah dibentangkan secara berkanun. Sehingga pada had bahawa amalan-amalan arahan bercanggahan, dari segi mendahului atau menyimpang secara substansialnya kaedah-kaedah berkanun mahkamah, ianya tidak mempunyai kesan undang-undang apa sekalipun. Bagaimanasekalipun, arahan-arahan amalan yang telah dikeluarkan dengan sempurna dan secara sah, mestilah dipatuhi.

[6] Syarat alternatif Arahan Amalan No. 1 Tahun 1995 Mahkamah Rayuan (suatu pengubahsuaian akan Arahan Amalan No. 1 Tahun 1992 Mahkamah Agong) membenarkan perayu mengemukakan sesalinan penghakiman, dekri atau perintah yang dirayui pada hari perbicaraan rayuan tersebut dalam mahkamah terbuka. Ianya tidak mewajibkan perayu untuk mematuhi syarat-syarat yang dibentangkan di dalam k. 18(7) KMR yang mana menetapkan bahawa kesemua dokumen-dokumen yang relevan di dalam rekod rayuan mestilah difailkan di pejabat pendaftaran "dalam tempoh enam minggu selepas rayuan atau dalam tempoh masa yang selanjutnya sepertimana yang mahkamah benarkan." Ianya mempunyai kesan mendahului atau menyimpang secara substansial syarat-syarat itu dan dengan itu, bercanggahan dengan k. 18(7) KMR. Oleh yang demikian, ianya tidak boleh mempunyai secara kesan undang-undang apa sekalipun. Dalam keadaan tersebut, perayu ketika mengemukakan salinan perintah dimeterai yang dirayui pada perbicaraan rayuan tersebut di dalam Mahkamah Rayuan tidak mematuhi k. 18(4) dan (7) KMR.

[7] Meskipun perkara di atas, ketidak-patuhan kaedah-kaedah boleh dipulihkan di bawah k. 102 KMT. Jika Mahkamah Rayuan telah menimbangkan k. 102 KMR, ianya pasti telah mengambilkira akan fakta-fakta ketara berikut: bahawa tidak terdapatnya pertikaian berhubung dengan kandungan-

kandungan perintah yang dirayui; bahawa perayu telah pun memfailkan dan menyampaikan rekod rayuan yang mengandungi salinan fotostat perintah yang dirayui; bahawa kesahihan salinan fotostat perintah yang telah dimeterai tidak dipertikaikan; bahawa perayu telah juga memfailkan dan menyampaikan rekod rayuan tambahan yang mengandungi salinan benar perintah yang dimeterai yang telah diakui sah; dan bahawa perayu telah mengemukakan salinan benar yang telah diakui sah akan perintah yang telah dimeterai itu di perbicaraan rayuan dalam mahkamah terbuka. Memandangkan keadaan-keadaan faktual tersebut, responden tidak diperdayakan mahupun dimudaratkan dalam sebarang keadaan meskipun terdapatnya ketidak-sempurnaan.

[8] Kegagalan Mahkamah Rayuan untuk mempertimbangkan k. 102 KMR telah secara bertentangan menjejaskan keputusannya dalam mempertahankan bantahan awal responden. Atas dasar itu, keputusan adalah dengan itu tidak sempurna yang mengakibatkan ketidak-adilan kepada perayu. Oleh itu, ini merupakan kes yang sempurna dan teratur untuk menggunakan kuasa sedia ada mahkamah di bawah k. 137 Kaedah-Kaedah Mahkamah Persekutuan 1995 dalam mencegah ketidak-adilan yang sedemikian.

Oleh Abdul Malek Ahmad HMP (majoriti)

[1] Kaedah 18(4)(d) KMR dengan jelasnya menyatakan bahawa perayu akan melampirkan kepada memorandum rayuan tersebut sesalinan penghakiman, dekri atau perintah dari yang mana dirayui. Oleh kerana sesalinan penghakiman tersebut telah pada hakikatnya dikemukakan, kaedah itu telahpun dipatuhi.

[2] Kaedah 18(7) KMR memperuntukkan bahawa rekod rayuan akan difailkan di pejabat pendaftaran dalam tempoh enam minggu selepas kemasukan rayuan tersebut atau di dalam tempoh masa akan datang sepertimana yang mahkamah benarkan. Sesalinan penghakiman tersebut telah pun dimasukkan di dalam rekod rayuan, dan oleh kerana ianya telah difailkan dalam tempoh masa tiga minggu yang dibenarkan daripada tarikh penerimaan nota-nota keterangan dan alasan-alasan penghakiman tersebut, tidak boleh diragui bahawa rekod rayuan tersebut adalah mengikut aturan.

[3] Ianya adalah amat jelas bahawa perayui telah mengikuti Arahan Amalan No. 1 Tahun 1992 Mahkamah Agong dengan sempurnanya. Arahan-arahan Amalan mempunyai kuasa undang-undang kerana ianya dibuat di bawah kaedah-kaedah yang relevan, contohnya, k. 77 KMR dan k. 138 Kaedah-Kaedah Mahkamah Agong 1980 yang mana menguasai fakta-fakta semasa kes ini. Malahan, meskipun ianya dimansuhkan oleh Kaedah-Kaedah Mahkamah Persekutuan 1995, k. 110 mempunyai peruntukan yang sama.

[4] Rekod rayuan tersebut pada hakikatnya mengikut aturan kerana telah pun terdapat sesalinan alasan-alasan penghakiman yang dilampirkan di dalamnya dan perayu telah mematuhi arahan amalan relevan yang mempunyai kuasa undang-undang. Oleh itu, jawapan kepada persoalan kedua pastinya positif. Jawapan kepada persoalan pertama akan menjadi negatif kerana ianya bertentangan dengan s. 96 AMK dan otoriti-otoriti yang diputuskan.

Oleh Ahmad Fairuz HMP (bertentangan)

[1] Keputusan Mahkamah Rayuan adalah perkara yang berkaitan dengan kaedah-kaedah prosedur Mahkamah Rayuan. Perkara ketidak-patuhan dengan KMR bukannya satu kausa atau perkara yang diputuskan oleh Mahkamah Tinggi di dalam lingkungan s. 96(a) AMK.

[2] Artikel 121(2) Perlembagaan mesti dibaca tertakluk kepada art. 128(3) Perlembagaan. Artikel 128(3) dengan jelasnya menyatakan bahawa bidangkuasa Mahkamah Persekutuan untuk menentukan rayuan-rayuan daripada Mahkamah Rayuan hendaklah sedemikiannya sepertimana yang diperuntukan oleh undang-undang persekutuan. AMK adalah undang-undang persekutuan yang sedemikian. Seksyen 96(a) AMK adalah jelas, nyata dan tidak diragui. Oleh kerana hal-perkara rayuan ini adalah jelas di luar bidangkuasa s. 96(a) AMK, Mahkamah Persekutuan tiada bidangkuasa untuk menentukan rayuan ini. Dengan demikian, persoalan kedua tidak perlu dipertimbangkan.

Oleh Mohtar Abdullah HMP (majoriti)

[1] Hakim haruslah memberikan perhatian terhadap k. 102 KMR yang mana memperuntukan bahawa ketidak-patuhan akan Kaedah-Kaedah Mahkamah Rayuan atau mana-mana kaedah amalan yang berkuatkuasa tidak akan menjadikan mana-mana prosiding terbatal. Kaedah tersebut juga memperuntukan kuasa budibicara hakim untuk menguruskan keadaan luar aturan yang sedemikian menurut cara dan atas terma-terma sepertimana yang dianggapkan sesuai oleh hakim.

[2] Kaedah 18(7) KMR sendiri memberikan jalan bagi perayu memohon kepada mahkamah untuk perlanjutan masa. Jika perayu gagal berbuat sedemikian, ianya tidak seharusnya ditolak secara muktamad. Mahkamah haruslah mempertimbangkan mengapa perayu telah bertindak mengikut cara yang telah dilakukan. Dalam kes semasa, perayu telah bergantung kepada arahan amalan Mahkamah Rayuan sendiri yang mana membenarkan prosedur alternatif untuk pemfailan atau pengemukaan salinan perintah mahkamah yang dirayui. Mahkamah Rayuan seharusnya memeriksa dengan

sempurnanya arahan amalannya sendiri dan mempertimbangkan perkara tersebut menurut KMR sepertimana yang telah diubahsuai oleh amalan tersebut.

[3] Syarat-syarat prosedur k. 18 KMR yang tegas telah dikurangkan oleh Arahan Amalan No. 1 Tahun 1995 Mahkamah Rayuan (yang menerima-pakai dan mengubahsuai Arahan Amalan No. 1 Tahun 1992 Mahkamah Agong). Arahan amalan tersebut memperuntukan bahawa sebaik sahaja perayu menerima perintah yang telah dimeterai daripada Mahkamah Tinggi, perintah tersebut boleh difailkan sebagai rekod rayuan tambahan tanpa sebarang keperluan untuk memfailkan satu permohonan bagi mengemukakannya sebagai rekod rayuan tambahan. Ungkapan "sebaik sahaja perayu menerima perintah yang telah dimeterai daripada Mahkamah Tinggi" tidak terlingkung di dalam sebarang jangka waktu kelayakan. Prosedur alternatif di dalam arahan amalan tersebut membenarkan perayu mengemukakan sesalinan penghakiman, dekri atau perintah terhadap yang mana dirayu pada hari perbicaraan rayuan tersebut di mahkamah terbuka.

[4] Arahan-arahan amalan adalah arahan-arahan untuk tujuan pentadbiran dan tidak mempunyai kuasa berkanun. Ianya membantu untuk memperjelaskan atau menonjolkan kaedah-kaedah sedia ada untuk pematuhan sempurna kaedah-kaedah tersebut sepertimana yang dibentangkan dalam kaedah-kaedah mahkamah yang relevan atau Akta-Akta Parlimen yang relevan. Walaubagaimanapun, Arahan Amalan No. 1 Tahun 1995 Mahkamah Rayuan ini di luar bidang pentadbirannya kerana ianya memperuntukkan bagi penyimpangan substansial daripada kaedah-kaedah prosedur tegas yang dibentangkan di dalam k. 18 KMR. Kesilapannya terletak pada pembuat dan pengeluar arahan amalan tersebut. Sesuatu kaedah mahkamah tidak boleh dipinda oleh suatu arahan pentadbiran. Kaedah 18 seharusnya diubahsuai dan dipinda sehubungan itu untuk memudahkan kedua-dua prosedur alternatif yang cuba diperkenalkan oleh arahan amalan tersebut.

[5] Ianya adalah jelas bahawa arahan-arahan amalan yang tidak mempunyai kuasa berkanun tidak boleh mendahului kaedah-kaedah mahkamah atau Akta-Akta Parlimen yang relevan. Tetapi di mana, seperti dalam kes semasa, kewujudan arahan amalan dan pematuhannya atau penggantungan terhadapnya menyebabkan litigan dihukum baginya, maka hakim atau mahkamah seharusnya melaksanakan budibicara kehakiman bagi mencegah ketidakadilan.

[6] Mahkamah rayuan salah dalam mempertahankan bantahan awal oleh responden bahawa perayu telah gagal untuk mendapatkan kebenaran bagi memfailkan rekod rayuan tambahan di luar masa. Perintah membatalkan rayuan tersebut dengan kos adalah salah. Diikuti, bahawa persoalan kedua

seharusnya dijawab secara positif. Memandangkan perkara tersebut, tidak terdapat sebarang keperluan untuk menjawab persoalan pertama secara khususnya. Ini adalah merupakan kes yang jelas di mana ketidakadilan telah dilakukan kepada perayu yang telah dinafikan haknya untuk rayuannya didengar berdasarkan merit-meritnya. Mahkamah ini mempunyai kuasa sedia ada untuk mendengar sebarang permohonan atau untuk membuat sebarang perintah sepertimana yang mungkin perlu bagi mencegah ketidakadilan atau untuk mencegah penyalahgunaan proses mahkamah (k. 137 Kaedah-Kaedah Mahkamah Persekutuan 1995).

[Rayuan dibenarkan mengikut majoriti; kes hendaklah dikemukakan kepada Mahkamah Rayuan untuk perbicaraan atas merit-merit.]

Case(s) referred to:

Asiah Abdul Manap & Anor v. Capital Insurance Bhd [1998] 4 CLJ 257 ***(refd)***
Auto Dunia Sdn Bhd v. Wong Sai Fatt & Ors [1995] 3 CLJ 485 ***(refd)***
Capital Insurance Bhd v. Aishah Abdul Manap [2000] 4 CLJ 1 ***(refd)***
Capital Insurance Bhd v. Kasim Mohd Ali [1996] 3 CLJ 19 ***(refd)***
Capital Insurance Bhd v. Kasim Mohd Ali [2000] 1 CLJ 269 ***(refd)***
Chia Yan Teck & Anor v. Ng Swee Keat & Anor [2001] 4 CLJ 61 ***(refd)***
Chin Choy & Ors v. Collector of Stamp Duties [1979] 1 MLJ 69 ***(refd)***
Datuk Syed Kechik Syed Mohamed & Anor v. The Board of Trustees of the Sabah Foundation & Ors [1999] 1 CLJ 325 ***(refd)***
Hiralal Ratan Lal v. The Sales Tax Officer, Section III, Kanpur AIR [1973] SC 1034 ***(refd)***
Lam Kong Co Ltd v. Thong Guan Co Pte Ltd [2000] 3 CLJ 769 ***(refd)***
Lee Lee Cheng (f) v. Seow Peng Kwang [1960] 26 MLJ 1 ***(refd)***
Ling Siok Seng v. Ting Sieh Chung [1998] 4 CLJ 169 ***(refd)***
Lye Thai Sang v. Faber Merlin (M) Sdn Bhd [1985] 2 CLJ 423; [1985] CLJ (Rep) 196 ***(refd)***
Morelle v. Wokeling [1955] 2 QB 379 ***(refd)***
Ooi Bee Tat v. Tan Ah Chim & Sons Sdn Bhd & Anor & Another Appeal [1995] 4 CLJ 484 ***(refd)***
PP v. Sihabduin & Anor [1981] CLJ 39; [1981] CLJ (Rep) 82 ***(refd)***
Raja Guppal Ramasamy v. Sagaran Pakiam [1999] 2 CLJ 972 ***(refd)***
Yeo Peck Chie v. KS Gill & Co [1946] MLJ 131 ***(refd)***
Yeo Yoo Teik v. Jemaah Pengadilan Sewa Pulau Pinang & Anor [1996] 2 CLJ 628 ***(refd)***

Legislation referred to:

Civil Law Act 1956, s. 3(1)(a)
Courts of Judicature Act 1964, ss. 17, 68(1)(a), 96(a)
Federal Constitution, arts. 4(1), 121(2), 128(3)
Road Transport Act 1987, ss. 91(4), 96(1)
Rules of the Court of Appeal 1994, rr. 16, 18(4)(d), (7), 77, 102, 103
Rules of the Federal Court 1995, rr. 110, 137
Rules of the High Court 1980, O. 18 r. 19(1)(b), (c)
Rules of the Supreme Court 1980, r. 138

Other source(s) referred to:
Andrew Harding, *Law, Government and the Constitution in Malaysia*, p 128
Halsbury's Law of England, 4th edn, vol 37, para 14
Practice Direction No 1 of 1992 (Supreme Court)

For the appellant - Su Tiang Joo (Teh Meng Teck & Richard WG Lee); M/s Cheah Teh & Su
For the respondent - Pawancheek Marican (Azhar Arman Ali & Md Yunus Shariff); M/s Wan Marican, Hamzah & Shaik

[Appeal from Court of Appeal; Civil Appeal No: W02-753-1998]

Reported by Usha Thiagarajah

JUDGMENT

Steve Shim CJ (Sabah & Sarawak):

The Issues

This is an appeal against the decision of the Court of Appeal given on 20 September 2000. Leave to appeal to the Federal Court was granted to the appellant on 17 April 2001 on the following questions:

(1) Whether the Federal Court has jurisdiction to determine appeals from any judgment, order or decision of the Court of Appeal which did not originate from the High Court save and except from any judgment, order or decision which is whether the Court of Appeal should or should not grant leave to appeal to it.

(2) Whether the appellant who is entitled to appeal to the Court of Appeal has complied with Rule 18(4)(d) and (7) of the Rules of the Court of Appeal 1994 when he tenders a sealed copy of the order appealed from before the hearing of the appeal in the Court of Appeal in compliance with the Supreme Court Practice Direction No. 1 of 1992.

In my view, the questions concern issues which are inextricably linked. Given the manner the questions are formulated and the focus in the submissions of counsel for the parties concerned, it seems obvious that the questions have to be considered in the same sequence.

The Background Facts

The factual background circumstances have been fully set out in the judgment of the Court of Appeal. Still, it is useful to restate them here but briefly. The respondent had filed an action in the High Court against the appellant who stood as guarantor of an overdraft facility for RM500,000 granted to one Wira Kris Agricultural Services Sdn. Bhd., the borrower. The appellant filed his defence as well as a summons-in-chambers for an order under O. 18 r. 19(1)(b) and (c) Rules of the High Court 1980 (RHC) to strike out the respondent's writ and statement of claim. The summons-in-chambers was part-heard by the learned judge but on the date of its continued hearing, the respondent's counsel was absent. There was no indication as to why he was absent. Nobody seemed to care. In any case, the court proceeded with the hearing and thereafter

allowed the application in terms thereof. Not surprisingly, the respondent then filed two applications: the first, to set aside the striking out order and the second, to amend the summons-in-chambers. The court allowed both applications. In allowing the first application, the court ordered the matter to be reinstated for rehearing. Against that order, the appellant appealed to the Court of Appeal. At the Court of Appeal, counsel for the respondent raised a preliminary objection that the appellant had not complied with r. 18(4)(d) and (7) of the Rules of the Court of Appeal (RCA) as the photocopy of the sealed order appealed against in the Appeal Record was not a certified true copy and as the Supplementary Appeal Record which had incorporated the certified true copy of the order was filed without leave of the court. After hearing arguments, the Court of Appeal upheld the preliminary objection, holding that the Appeal Record was defective and therefore, there was no proper appeal before it, relying, it seems, on another Court of Appeal's decision in *Capital Insurance Bhd v. Kassim bin Mohd Ali* [2000] 1 CLJ 269. The appeal was then struck out with costs.

Section 96 Courts Of Judicature Act 1964 And Article 121(2) Federal Constitution

It seems clear that the first question postulated for our consideration turns on the proper construction to be placed on s. 96(a) Courts of Judicature Act 1964 in the context of the particular factual circumstances of this case. From the outset, it seems obvious the appellant was facing an uphill battle in view of the decision of the Federal Court in *Capital Insurance Bhd v. Aishah bte Abdul Manap & Anor* [2000] 4 CLJ 1 which had followed its previous decision in *Lam Kong Company Ltd v. Thong Guan Co Pte Ltd* [2000] 3 CLJ 769. Thus, in an attempt to overcome the adversity, counsel for the appellant has submitted that the Federal Court's construction of s. 96(a) Courts of Judicature Act in *Capital Insurance* and *Lam Kong* was made *per incuriam*. Its attention was not drawn to the all-encompassing scope and effect of art. 121(2) Federal Constitution. He contends that the Federal Court, being the apex court, performs the vital function of supervising the process of judicial law-making and as such it must have jurisdiction to correct any erroneous decision of the Court of Appeal. Article 121(2), states:

> (2) There shall be a court which shall be known as the Mahkamah Persekutuan (Federal Court) and shall have its principal registry in Kuala Lumpur, and the Federal Court shall have the following jurisdiction, that is to say:
>
> (a) **jurisdiction to determine appeals from decisions of the Court of Appeal**, of the High Court or a judge thereof.
>
> (b) such original or consultative jurisdiction as is specified in Articles 128 and 130; and
>
> (c) such other jurisdiction as may be conferred by or under federal law.

In emphasising the words underscored, counsel contends that the jurisdiction of the Federal Court is enshrined in art. 121(2) Federal Constitution and that having conferred upon the Federal Court such jurisdiction, no federal law can divest it. To do so, according to him, would render such federal law inconsistent with the overriding provisions of the Federal Constitution and therefore void by virtue of art. 4(1). In this connection, he argues that s. 96(a) Courts of Judicature Act (which prescribes the jurisdictional limits of the Federal Court in civil appeals) must be construed in a manner consistent with art. 121(2) Federal Constitution. He maintains that the Federal Court in *Capital Insurance* did not address itself to art. 121(2) Federal Constitution and therefore had construed s. 96(a) of the Act in a manner inconsistent with the said art. 121(2) and thus void under art. 4(1) thereof. In summary, he appears to take the stand that in construing s. 96(a), the Federal Court has jurisdiction to determine appeals from all decisions of the Court of Appeal whether or not those decisions arose from causes or matters decided by the High Court in the exercise of its original jurisdiction.

The Ratio In *Capital Insurance* And *Lam Kong*

To appreciate counsel's argument, it is necessary to examine in depth *Capital Insurance*. There, the appellant's appeal before the Court of Appeal was dismissed upon a preliminary objection raised by the respondent that the record of appeal was bad in law in that it did not contain the sealed copy of the judgment appealed from. The appellant appealed to the Federal Court. The respondent raised a preliminary objection at the leave stage contending that the Federal Court did not have jurisdiction to hear the matter on the ground that it was not an appeal against the judgment of the Court of Appeal in respect of any cause or matter decided by the High Court in the exercise of its original jurisdiction. That objection was summarily dismissed and leave was granted to appeal. At the hearing of the appeal, the same preliminary objection was raised by the respondent. In sustaining the preliminary objection, Mohamed Dzaiddin, FCJ (as he then was) said *inter alia*:

> Accordingly, after considering the background facts and the authorities, we agree with counsel for the respondents that the present appeal is from the decision of the Court of Appeal on a preliminary objection taken by the respondents in which the Court held that the appeal record and the supplementary appeal record were defective for non-compliance of r. 18(4)d and (7) of the Court of Appeal Rules 1994. As was stated in *Auto Dunia Sdn Bhd v. Wong Sai Fatt & Ors* [1995] 2 MLJ 549 it is an elementary proposition that the Court is a creature of statute and that equally a right of appeal is also a creature of statute, so that unless an aggrieved party can bring himself within the terms of a statutory provision enabling him to appeal, no appeal lies. Thus, it is patently clear that the subject-matter of the present appeal is not from the judgment of the Court of Appeal in respect of the cause or matter decided by the High Court in the exercise of its original jurisdiction.

In coming to this conclusion, the Federal Court adopted the same stand taken in *Lam Kong*. Because of this nexus, it may be useful to take a closer look at *Lam Kong*. There, the applicant had filed an appeal in the Court of Appeal against the decision of the High Court without first obtaining leave under s. 68(1)(a) Courts of Judicature Act 1964. On a preliminary objection raised by the respondent, the Court of Appeal struck out the appeal for want of leave. The applicant appealed to the Federal Court. By a majority, the Federal Court held as follows:

1. That the Court of Appeal was the legal authority to decide whether or not leave to appeal was required and that decision was final and non-appealable. To hold otherwise would defeat the "filter principle" reflected in the purpose or object of s. 68(1)(a) CJA in the wake of the decision in *Auto Dunia*.

2. That *Auto Dunia* decided that the order granting or refusing leave to appeal under s. 68(1)(a) CJA by the Court of Appeal was final and non-appealable; that by anology, the decision of the Court of Appeal as to whether or not leave was required should also be final and non-appealable.

3. That unless there was an express provision that an appeal should lie from the Court of Appeal to the Federal Court from its interlocutory judgment or order in respect of a matter pending appeal before it, by necessary intendment of s. 96(a) CJA, the interlocutory judgment or order of the Court of Appeal was not appealable and did not come within the meaning of s. 96(a).

It seems clear that *Capital Insurance* concerns a situation where the Federal Court was asked to deal with the decision of the Court of Appeal relating specifically to the defectiveness of the appeal record. That was the sole focus of the preliminary objection before it. In sustaining the preliminary objection raised by the respondent, the Court of Appeal held that the appeal record was defective for non-compliance of r. 18(4)(d) and (7) RCA. Similarly, in the instant case, the same preliminary objection was raised by the respondent in the Court of Appeal which was upheld. The Court of Appeal held that the Appeal Record was defective and accordingly, struck off the appeal on that basis.

In my view, art. 121(2) Federal Constitution is a general provision relating to the jurisdiction of the Federal Court. It is an empowering provision which states that the Federal Court shall have jurisdiction to determine appeals from decisions of the Court of Appeal and the High Court. It is pertinent to note the conspicuous absence of the word "all" or "any" preceding the word "decisions" in the provision. If it was the intention of Parliament to confer jurisdiction on the Federal Court to hear appeals from all decisions of the Court of Appeal, the word "all" or "any" would have been included therein. The exclusion of those words, in my view, was clearly deliberate. It was intended that not all decisions are appealable. Furthermore, whilst art. 121(2) Federal Constitution is of general import on the jurisdiction of the Federal Court, art. 128(3) thereof is more specific. It states:

(3) The jurisdiction of the Federal Court to determine appeals from the Court of Appeal, a High Court or a Judge thereof shall be such as may be provided by federal law.

Quite clearly, the two articles have to be read in tandem. There can be no dispute that the statute conferring jurisdiction on the Federal Court concerning appeals in civil matters is the Courts of Judicature Act 1964. That is the statute envisaged in art. 128(3) Federal Constitution in the words "provided by federal law" stipulated therein. In the Courts of Judicature Act 1964, the conditions of appeal are specifically provided for in s. 96(a) and (b) which states:

96. Conditions of appeal

Subject to any rules regulating the proceedings of the Federal Court in respect of appeals from the Court of Appeal, an appeal shall lie from the Court of Appeal to the Federal Court with the leave of the Federal Court –

(a) from any judgment or order of the Court of Appeal in respect of any civil cause or matter decided by the High Court in the exercise of its original jurisdiction involving a question of general principle decided for the first time or a question of importance upon which further argument and a decision of the Federal Court would be to public advantage; or

(b) from any decision to the effect of any provision of the Constitution including the validity of any written law relating to any such provision.

Now, in *Lam Kong*, Mohamed Dzaiddin FCJ had occasion to touch on the breadth and scope of s. 96(a). He said *inter alia:*

It is to be noted that Parliament has thought fit to impose conditions in respect of right of appeal from the Court of Appeal to the Federal Court under s. 96(a) of the Act. The conditions are that leave of the Federal Court must be obtained and the matters that are appealable are from any judgment or order of the Court of Appeal in respect of any cause or matter decided by the High Court in the exercise of its original jurisdiction.

And later in his judgment, he added:

In our view, based on the above statement of principles and in the context of s. 96(a) of the Act, it is laudable, as a matter of policy, to restrict the right of appeal from the Court of Appeal to the Federal Court with leave only to cases where the judgment or order of the Court of Appeal is in respect of any civil cause or matter decided by the High Court on the merits. If a decision of the Court of Appeal made in a motion in a pending appeal is appealable, then the result would be that there would be two appeals in every case in which, following the ordinary course of things, there would only be one. Hence, the policy of requiring leave to appeal under s. 96(a) to act as a filter against unnecessary appeals would be defeated.

The view expressed by his Lordship is but a mere reflection of the intention of Parliament. The Federal Court is a creature of statute. So is the right of appeal. This means that unless an aggrieved party can bring himself within

the parameters of s. 96(a) Courts of Judicature Act 1964, no appeal lies. It is abundantly clear therefore that the Federal Court has no jurisdiction to determine appeals from any judgment, order or decision of the Court of Appeal unless such judgment, order or decision is in respect of any cause or matter decided by the High Court in the exercise of its original jurisdiction. It is within this perceptibly narrow confine that an appellant must ventilate his case. From that perspective, my answer to the first question has to be in the negative.

The Decision Of The Court of Appeal

This brings us to the all-important question of whether the decision of the Court of Appeal, in the instant case, falls within the parameters of s. 96(a) of the Act. It cannot be gainsaid that the decision of the Court of Appeal in dismissing the appeal relates essentially in upholding the preliminary objection of the respondent on the ground that the Appeal Record was defective for non-compliance of the RCA in juxtaposition to the decision of the High Court which relates pointedly to granting of an application of the respondent to set aside the striking out order granted earlier to the appellant. Quite clearly, the decisions relate to matters which are poles apart. They are substantially different in nature. By this, I am not suggesting that the issues before the respective courts have to be on all fours with one another, but there must be some material connection between them. Here, there is none. The only tenuous connection is that the Appeal Record contains the notes of proceeding as well as the decision of the High Court. The connection is vague and remote. In the circumstances, it cannot seriously be said that the decision of the Court of Appeal is in respect of the cause or matter decided by the High Court in the exercise of its original jurisdiction. The decision to dismiss by the Court of Appeal is grounded essentially on the defectiveness of the Appeal Record and nothing else. If the words "in respect of" in s. 96(a) Courts of Judicature Act are to be construed to encompass such a tenuous connection, as in this case, then I fear we would have stretched the construction unduly wide thereby rendering ineffective the purpose for which Parliament has intended and that is to restrict civil appeals in appropriate cases to the Federal Court. In this connection, I would subscribe to the sentiments and observations expressed by Mohamed Dzaiddin FCJ in *Capital Insurance* and *Lam Kong*. Nothing in the arguments of counsel for the appellant has convinced me that those cases have been decided incorrectly.

For the reasons stated, I take the stand that the order or decision of the Court of Appeal, in the instant case, does not fall within the ambit of s. 96(a) Courts of Judicature Act 1964. In that context, it can be said that the Federal Court will have no jurisdiction to determine an appeal concerning such an order or decision.

Inherent Powers Of The Federal Court

Where there is a clear case of injustice being committed, the Federal Court, as the apex court in the land, cannot stand idly by and do nothing. It cannot and should not shirk from its responsibility of preventing injustice in appropriate cases. It must deal with it. In this regard, the Federal Court has been conferred with inherent powers under r. 137 Federal Court Rules 1995. This has been reiterated very recently by the Federal Court in *Chia Yan Teck & Anor v. Ng Swee Keat & Anor* [2001] 4 CLJ 61 when Mohd. Dzaiddin KHN said *inter alia*:

> Rule 137 of the Rules clearly gives us the inherent power to hear any application or make any order as may be necessary to prevent injustice.

In addition, I take the view that the Federal Court also has the inherent jurisdiction under the common law to deal with cases with a view to preventing injustices in limited circumstances. This is clearly in line with s. 3(1)(a) Civil Law Act 1956, which was promulgated in accordance with cl. (c) of art. 121(2) Federal Constitution which confers on the Federal Court "such other jurisdiction as may be conferred by or under federal law." Section 3(1)(a) under the heading: **Application of UK Common Law, rules of equity and certain statutes**, states as follows:

> Save so far as other provision has been made or may hereafter be made by any written law in force in Malaysia, the court shall –
>
> (a) in West Malaysia or part thereof, apply the common law of England and the rules of equity as administered in England on the 7th day of April 1956 ...
>
> Provided always that the said common law, rules of equity and statutes of general application shall be applied so far only as the circumstances of the States of Malaysia and their respective inhabitants permit and subject to such qualification as local circumstances render necessary.

In 1956, the common law of England clearly recognised the superior courts as having inherent jurisdiction to deal with issues of injustice in certain cases. (See *Halsbury's Law of England* – 4th edn, vol. 37 para. 14).

In this case, the appellant has complained bitterly of the injustice suffered as a result of the alleged erroneous decision of the Court of Appeal in sustaining the preliminary objection of the respondent. He has, through counsel, urged us to invoke our inherent power to prevent such injustice.

Rule 18(4) & (7) Rules Of The Court of Appeal

Given the nature of the complaint raised by the appellant, it becomes necessary to deal with the second question for which leave was granted ie, whether the appellant had complied with r. 18(4) and (7) Rules of the Court of Appeal 1994 when he tendered a sealed copy of the order appealed from before the

hearing of the appeal in the Court of Appeal in compliance with the Court of Appeal Practice Direction No. 1 of 1995.

Now, r. 18(4) and (7) stipulates:

> (4) The appellant shall attach to such memorandum copies of the proceedings in the High Court, including –
>
> (a) copies of the documents in the nature or pleadings, so far as is necessary for showing the matter decided and the nature of the appeal;
>
> (b) a copy of the Judge's notes of the hearing of the cause or matter in which the decision appealed against was given;
>
> (c) copies of all affidavits read and of all documents put in evidence in the High Court so far as they are material for the purposes of the appeal, and subject to rule 101 if such documents are not in the national language, copies of certified translations thereof;
>
> (d) a copy of the judgment, decree or order appealed from;
>
> (e) a copy of the written judgment or grounds of decision of the Judge, or a copy of the agreed notes or judgment as prepared by the parties and approved by the Judge, if such written judgment, grounds of decision or agreed notes as approved is made available within the time limited for filing the record of appeal, provided that if the court so orders, the absence of the written judgment, grounds of decision or agreed notes shall not prevent the appellant from proceeding with his appeal; and
>
> (f) copy of the notice of appeal.

It seems clear that whilst sub-r. (4) sets out the types of documents to be attached to the Memorandum of Appeal which will form the record of appeal, sub-r. (7) stipulates the length of time in which the said documents should be filed with the registry. Here, it is perhaps pertinent to note that all the relevant documents have to be filed at the registry "within six weeks after the entry of the appeal or within such further time as the court may allow." This means that if a party needs further time beyond the required six weeks, he will have to apply to the court for it.

And the Court of Appeal Practice Direction No. 1 of 1995 (a modified version of the Supreme Court Practice Direction No. 1 of 1992) reads as follows:

> Di bawah peruntukan kaedah 18(4)(d) Kaedah-Kaedah Mahkamah Rayuan 1994, seseorang perayu adalah dikehendaki menyertai satu salinan penghakiman, dekri atau perintah yang dirayu kes-kes rayuan di Mahkamah Rayuan.
>
> Sehubungan dengan itu didapati kebanyakan perayu tidak mematuhi peruntukan tersebut dan ini melambatkan penetapan kes-kes rayuan di Mahkamah Rayuan.
>
> Untuk menyegerakan prosiding rayuan di Mahkamah Rayuan, *sebaik sahaja perayu menerima perintah termeterai dari Mahkamah Tinggi, perintah tersebut bolehlah difailkan sebagai rekod rayuan tambahan tanpa sebarang permohonan.*

Sebagai alternatif, perayu dibenar menyerahkan salinan penghakiman, dekri atau perintah yang dirayu pada hari perbicaraan rayuan di dalam Mahkamah Terbuka. Pihak Penentang sewajarnya diberitahu di atas penyerahan ini.

From the contents therein, it can be seen that the said Practice Direction deals specifically with documents falling under r. 18(4)(d) RCA. The parts underscored are significant for our purpose. The first part provides that as soon as the appellant received the sealed order from the High Court, it can be filed as a supplementary record of appeal without any application. The second part provides an alternative requirement ie, that the appellant is allowed to tender a copy of the judgment, decree or order appealed from on the day of the hearing of the appeal in open court.

In *Ooi Bee Tat v. Tan Ah Chim & Sons Sdn Bhd & Anor* [1995] 4 CLJ 484, it was held that Practice Directions were effected for administrative purposes. I accept that as a correct statement of the law. Undoubtedly, they provide guidelines for a more effective implementation of the rules of court. They seek to clarify or highlight such rules. They may even, to some extent, modify them, but certainly they are not meant to supercede or deviate from court rules which have been statutorily laid down. To do so would, in my view, be a negation of the authority of Parliament which has conferred powers upon the Rules Committee under s. 17 Courts of Judicature Act 1964 to make rules of court.

It is true that the Chief Justice has been empowered under r. 110 Rules of the Federal Court 1995 to issue Practice Directions. So has the President of the Court of Appeal under r. 77 Rules of the Court of Appeal. Nevertheless, it cannot have been in the contemplation of Parliament that they can issue Practice Directions in direct conflict with procedural rules of court which have been statutorily laid down. In my view, to the extent that such Practice Directions are in conflict, in the sense of superceding or deviating substantially from statutory rules of court, they are of no legal effect whatsoever. Of course, once Practice Directions have been properly and legally issued, they must be complied with. I believe that to be trite: (see *Yeo Yoo Teik v. Jemaah Pengadilan Sewa, P Pinang & Anor* [1996] 2 CLJ 628; *Raja Guppal a/l Ramasamy v. Sagaran a/l Pakiam* [1999] 2 CLJ 972)

This brings into focus the question of whether the alternative requirement provided in Practice Direction No. 1 of 1995 has the effect of superceding or substantially deviating from r. 18 RCA in particular sub-r. (7) thereof which, as I have said, requires all relevant documents to be filed at the registry within six weeks after the entry of the appeal or within such further time as the court may allow. In respect of r. 18(4)(d), the Court of Appeal in *Capital Insurance v. Kassim (supra)* seems to have held that only the original or duplicate copies or certified true copies of those documents are acceptable. In principle, I think that is a fair proposition to take in order to avoid or prevent abuses. As mentioned earlier, the alternative requirement is one which allows an appellant

to tender a copy of the judgment, decree or order appealed from on the day of hearing of the appeal in open court. The alternative requirement does not oblige the appellant to comply with the conditions set out in r. 18(7). In my view, it has the effect of superceding or deviating substantially from those conditions. This is in conflict with r. 18(7). As such, it cannot have any legal effect whatsoever. To that extent, it can and should be ignored. In the circumstances, I find no difficulty in holding that the appellant, on tendering a sealed copy of the order appealed from on the hearing of the appeal in the Court of Appeal, has not complied with r. 18(4) and (7) of the Rules.

Rule 102 Rules Of The Court Of Appeal

That, however, does not add finality to the equation. Counsel for the appellant has submitted, in the alternative, that even if there was non-compliance of the said rule, the defect was only a mere irregularity which was curable under r. 102 RCA. From the very brief judgment of the Court of Appeal, in seems clear that, apart from relying on *Capital Insurance v. Kassim (supra)*, it had not addressed itself to this important consideration, r. 102 states:

> Non-compliance of any of these Rules, or with any rule of practice for the time being in force, shall not render any proceedings void unless the Court or a Judge shall so direct, but such proceedings may be set aside either wholly or in part as irregular, or amended, or otherwise dealt with in such manner and upon such terms as the Court or Judge shall think fit.

Had the Court of Appeal considered r. 102, it would have taken note of the following salient facts; that there was no dispute as to the contents of the order appealed against: that the appellant had already filed and served the Appeal Record containing a photocopy of the sealed order; that the authenticity of the said photocopy of the sealed order was not in dispute; that the appellant had also filed and served the Supplementary Appeal Record containing the certified true copy of the sealed order and in addition, the appellant had tendered a certified true copy of the sealed order at the hearing of the appeal in open court. Given those factual circumstances, it would have concluded that the respondent had neither been misled nor prejudiced in any way notwithstanding the defect. There was no substantial miscarriage of justice involved. That being the position, the defect was certainly curable under r. 102 RCA. In my view, the Court of Appeal's failure to consider r. 102 has adversely affected its decision in upholding the preliminary objection of the respondent. On that basis, its decision is therefore flawed resulting in injustice to the appellant. In my view, this is a fit and proper case to invoke the inherent power of the court under r. 137 Rules of the Federal Court 1995 in preventing such injustice.

In the circumstances, I will allow the appeal with costs here and below. The matter is to be remitted to the Court of Appeal for re-hearing on the merits.

Abdul Malek Ahmad FCJ:

The respondent had filed their writ of summons and statement of claim at the High Court in Kuala Lumpur on 14 August 1992. After the service of the appellant's defence on the respondent and the respondent's reply on the appellant, the appellant on 29 December 1992 filed his summons-in-chambers to strike out the respondent's writ of summons and statement of claim.

The High Court on 21 June 1994 heard the said summons-in-chambers and on 27 September 1994 allowed the appellant's application by striking out the respondent's claim with costs. After the said order was perfected on 22 November 1994, the respondent on 24 November 1994 filed a summons-in-chambers to set aside the High Court order dated 27 September 1994.

This was heard on 9 June 1995. It was, however, adjourned when the respondent applied for leave to amend the said summons-in-chambers. They filed the application to do so on 20 July 1995. On 7 September 1995 the High Court ordered both parties to file written submissions. On 20 October 1998 the High Court allowed both the respondent's applications dated 24 November 1994 and 20 July 1995, set aside the order dated 27 September 1994 but ordered that costs of both applications be paid by the respondent to the appellant.

The notable feature evident in examining the chronology of events in the High Court is that there had been undue delay in the hearing and decision of all the applications.

The notice of appeal in the Court of Appeal was filed by the appellant on 17 November 1998 and on 21 December 1998 the appellant was allowed to file the record of appeal within three weeks from the date of receipt of the notes of evidence. When he received them and the grounds of judgment on 24 February 1999, he filed the record of appeal on 16 March 1999 and served it on the respondent on the same date.

On 30 August 2000, the appellant received the notice of hearing by facsimile that the appeal was to be heard on 18 September 2000. On the same date, the appellant applied for certified true copies of the order appealed against. The next day was a public holiday as it was the country's national day.

On 1 September 2000, the appellant received the certified true copies of the order appealed against. The next day was a Saturday and, being the first Saturday of the month, was a holiday. 3 September 2000 was a Sunday. On 4 September 2000, the appellant's solicitors prepared the supplementary record of appeal.

On 13 September 2000, the respondent's solicitors gave notice of a preliminary objection in that the appellant's appeal did not comply with r. 18(4)(d) and r. 18(7) of the Rules of the Court of Appeal 1994 (hereinafter "the RCA"). On the next day, the appellant's solicitors asked the respondent's solicitors for particulars of the preliminary objection and, after getting their response,

gave written notice that a certified true copy of the order appealed against would be tendered in the Court of Appeal at the hearing of the appeal.

On 15 September 2000, the appellant applied for three additional certified true copies of the order appealed against which were provided on the same day. On 18 September 2000, the hearing was adjourned to 20 September 2000. A certified true copy of the order appealed against was submitted to the Court of Appeal in open court but after hearing the respondent's preliminary objection, it was allowed and the appellant's appeal was struck out with costs.

On 17 April 2001, the Federal Court gave leave to the appellant to appeal against the whole of the decision of the Court of Appeal on 20 September 2000 on the following two questions:

(a) whether the Federal Court has the jurisdiction to determine appeals from any judgment, order or decision of the Court of Appeal which did not originate from the High Court save and except from any judgment, order or decision which is on whether the Court of Appeal should or should not grant leave to appeal to the Court of Appeal; and

(b) whether an appellant who is entitled to appeal to the Court of Appeal has complied with rr. 18(4)(d) and (7) of the RCA when he tenders a sealed copy of the order appealed from before the hearing of the appeal in the Court of Appeal in compliance with the Supreme Court('s) Practice Direction No. 1 of 1992 (adopted for appeals to the Court of Appeal *vide* Court of Appeal Practice Direction No. 1 of 1995).

Rule 18(4)(d) of the RCA states that the appellant shall attach to the memorandum of appeal a copy of the judgment, decree or order appealed against. Rule 18(7) of the same rules provides that the memorandum and the copies referred to in the earlier subrules shall together be called the record of appeal and shall be filed at the registry within six weeks after the entry of the appeal or within such further time as the court may allow.

The preliminary objection of the respondent in the Court of Appeal was that the photocopy of the sealed order appealed against in the record of appeal was not a certified true copy and the supplementary record of appeal which contained the certified true copy of the order was filed without leave of court. Accordingly, it was their contention that both the record of appeal and supplementary record of appeal should be set aside or expunged and consequently the appellant's appeal should be struck out or dismissed with costs.

We need to look at a number of recently decided authorities to consider the line of arguments raised here.

In *Capital Insurance Bhd v. Kasim bin Mohd Ali* [1996] 3 CLJ 19, the respondent had obtained judgment against the driver and owner of a motor vehicle which had knocked him down. Since the judgment could not be

enforced, the respondent filed a recovery action against the appellant as the insurer of the motor vehicle. The High Court granted summary judgment against the appellant for the sum claimed, interests and costs. The appellant appealed.

The respondent's counsel filed a separate application to substitute the respondent's widow as the respondent had died pending the appeal hearing. He also filed an application by way of a preliminary objection to strike out the notice of appeal and the records of appeal on the ground that the appellant had not complied with r. 18(4)(d) of the RCA as the order appealed against dated 9 February 1995 had not been extracted and filed in the record of appeal.

The Court of Appeal held:

(a) the only way substitution could be done where a deceased had died intestate is through the widow obtaining letters of administration of her husband's estate. In this case, the widow had not yet applied for letters of administration;

(b) rule 18(4)(d) of the RCA requires an appellant to include in his memorandum of appeal, a copy of the judgment, decree or order appealed from. In this case, a copy of the judgment had been included in the memorandum of appeal. Since that judgment, in as much as the order, had been appealed against, there was no merit to the respondent's preliminary objection, particularly when r. 18(4)(d) makes reference to 'a judgment, decree or order';

(c) the respondent's cause of action against the appellant was founded under s. 96(1) of the Road Transport Act 1987 (hereinafter "the RTA") under which an insurer is dutybound to satisfy any judgment obtained against any person insured by the insurer in respect of third party risks. However, the liability to satisfy such judgment is conditional upon the insurer having delivered a certificate of insurance under s. 91(4) of the RTA to the person by whom the policy has been effected. The letter from the RIMV was not evidence of any delivery of such certificate;

(d) since it was clear that there had been no proof of delivery of the certificate of insurance as required by s. 96(1) of the RTA, this in itself provided a triable issue for which the appellant had pleaded that the RIMV's letter was forged, a fact which had been confirmed by the Motor Insurers Bureau of West Malaysia.

For this appeal, we are only concerned with para. (b) of that decision. The matter was remitted back to the High Court for hearing. The respondent appealed to the Federal Court in *Asiah bte Abdul Manap & Anor v. Capital Insurance Bhd* [1998] 4 CLJ 257 which allowed the appeal on the ground that the proceedings in the Court of Appeal were irregular as there was no properly constituted party on whose behalf learned counsel for the respondent could

act, as he was acting on a retainer that had lapsed on his client's death, and ordered that the appeal be heard by a different panel in the Court of Appeal.

It was at this second hearing at the Court of Appeal in *Capital Insurance Bhd v. Kasim bin Mohd. Ali* [2000] 1 CLJ 269 when learned counsel for the respondent, as he had done in the earlier appeal hearing in the Court of Appeal, again raised a preliminary objection on the ground that the record of appeal is bad in law and ought to be set aside for non-compliance with r. 18(4)(d) and r. 18(7) of the RCA. This was because the record of appeal did not contain a copy of the order of the court appealed against, that the supplementary record of appeal was filed out of time and leave had not been obtained, and that the order contained in the supplementary record of appeal was only a photostat copy and not a sealed copy or a certified true copy of the sealed copy.

The appellant argued that the sealed copy of the order was filed in the supplementary record of appeal, that under the Supreme Court Practice Direction No. 1 of 1992, which is applicable to the Court of Appeal with certain modifications, leave is not necessary to file the sealed copy of the order by way of a supplementary record of appeal, that the court has the discretion to cure under r. 102 of the RCA, and that the appeal is by way of rehearing on its merits as ordered by the Federal Court and the respondent should not be allowed to raise preliminary objections at that stage.

Unlike the first Court of Appeal hearing where the preliminary objection was dismissed, these arguments found favour with the Court of Appeal the second time around which decided that:

(a) the judgment to be presented for entry must be a fair copy of the judgment and not a draft judgment as a draft judgment is not a judgment since a draft implies that it needs perfection and approval;

(b) although a supplementary record of appeal containing the sealed copy of the order could be filed without leave of the court, the practice direction also made it clear that the filing of it should be done as soon as the appellant received the sealed order and since the onus is on the appellant that the supplementary record of appeal was filed soon after they received the sealed copy of the order, they had not satisfied the court that the supplementary record of appeal was filed on time, and accordingly the failure on the part of the appellant to apply for leave to file out of time was fatal;

(c) copies of the documents as envisaged by the RCA especially in respect of those important documents must be the duplicate copies or certified true copies of the originals. Neither the original nor the duplicate or certified true copy of the sealed copy of the order is found in the supplementary record of appeal;

(d) the rules and practice directions made by the court are to be obeyed and not to be broken and parties to an appeal must adhere and comply strictly to those rules and directions. Taking in consideration the attitude of the appellant for ignoring the defects and irregularities after the respondent had pointed them out, the court could not exercise its discretion to help the appellant in regularising the record of appeal;

(e) the issue whether the record of appeal should be set aside on the ground of non-compliance with the RCA was not decided by the Federal Court. As such, the respondent had the right to raise the issue again before the court. Further, the issue of non-compliance with the rules is by itself a merit to be decided so when the record of appeal is not filed or is defective, then there is no appeal before the court as regards which the court could consider.

In *Auto Dunia Sdn Bhd v. Wong Sai Fatt & Ors* [1995] 3 CLJ 485, the High Court gave judgment in favour of the plaintiffs in a motor accident case. As the value of the subject matter was less than RM250,000, the defendant applied to the Court of Appeal for leave to appeal before filing its appeal, pursuant to s. 68(1)(a) of the Courts of Judicature Act 1964 (hereinafter "the CJA"). That leave application was refused.

Relying on s. 96(a) of the CJA, the defendant applied to the Federal Court for leave to appeal against the Court of Appeal's refusal to grant leave to appeal. The question of law which arose was whether the power to give leave to the Court of Appeal to appeal was confined exclusively to the Court of Appeal. In deciding the question, the Federal Court had to consider whether the refusal of leave by the Court of Appeal was a judgment or order within s. 96(a) of the CJA so as to enable the Federal Court to entertain the application.

In dismissing the appeal, Lamin PCA held that the case was in the nature of an application to the Federal Court for leave to appeal to the Court of Appeal. If an appeal is to be lodged in the Court of Appeal in the circumstances falling within the terms of s. 68(1)(a) of the CJA, leave must first be obtained from the same court. Likewise, s. 96(a) of the CJA dictates that before a notice of appeal can be filed in the Federal Court, its leave must first be obtained. In consequence, the Federal Court has no power to grant leave for the purpose of lodging an appeal in the Court of Appeal.

Edgar Joseph Jr FCJ in his judgment decided that as both the court and the right of appeal thereto are creatures of statute, no appeal lies unless an aggrieved party can bring himself within the terms of a statutory provision enabling him to appeal. In that regard, there is no such provision. He reiterated that the exercise of a discretion to grant or refuse leave to appeal is not a judgment or order within the meaning of s. 96(a) of the CJA.

In *Lam Kong Company Ltd v. Thong Guan Co Pte Ltd* [2000] 3 CLJ 769, the applicant had filed an appeal to the Court of Appeal without leave in respect of a subject matter which was less than RM250,000. The Court of Appeal allowed the respondent's motion to strike out the appeal.

In the appeal by the applicant before the Federal Court, the respondent raised the preliminary objection that the application was misconceived because it was founded on the decision of the Court of Appeal under s. 68(1)(a) of the CJA and not from its judgment or order in respect of a civil cause or matter decided by the High Court in the exercise of its original jurisdiction within the meaning of s. 96(a) of the CJA.

The majority decision per Mohamed Dzaiddin FCJ (as he then was) and Haidar Mohd Noor JCA (as he then was) was as follows:

(a) the legal authority to decide whether leave is required or not under s. 68(a) of the CJA is the Court of Appeal and the decision of the Court of Appeal is final and not appealable as otherwise, the "filter" principle would be defeated;

(b) in the instant appeal, the application was founded on the judgment of the Court of Appeal in a pending appeal made on an application by the respondent to strike out the applicant's notice of appeal for want of leave required under s. 68 of the CJA;

(c) under s. 96(a) of the CJA, the judgment or order of the Court of Appeal which is appealable to the Federal Court must be in respect of a cause of matter decided by the High Court on the merits and not in respect of an interlocutory judgment or order decided by the Court of Appeal upon the hearing of an application made to it in a pending appeal before it;

(d) upon striking out the applicant's appeal in the Court of Appeal, the applicant's rights were not exhausted or shut out or for that matter in any way prejudiced as the applicant should have resorted to r. 16 of the RCA for enlarged time to apply for leave;

(e) by filing the present application, the applicant attempted to circumvent the said r. 16 and it was an abuse of the process of the court if all remedies available under the law were not first exhausted.

The significant difference between the *Lam Kong Company* case and that of *Auto Dunia* is that in the latter, leave to appeal to the Court of Appeal was applied for but was refused whereas in the former, no leave was obtained before filing the appeal. This is made clear in the dissenting judgment of Chong Siew Fai CJ (Sabah and Sarawak) where he said:

(a) the present case may be distinguished from the *Auto Dunia* case because in *Auto Dunia* it was not disputed that leave to appeal to the Court of Appeal was necessary. Hence, what the Court of Appeal had to decide

was whether to grant or to refuse leave. However, in the instant case, it was disputed as to whether leave to appeal to the Court of Appeal was necessary;

(b) the decision of striking out or dismissal would be appealable for the issue was not whether to grant or refuse leave to appeal, which would be non-appealable, but rather whether the deciding court was right in holding that leave to appeal was necessary;

(c) the words "in respect of" in s. 96(a) of the CJA means that there must be some connection or relation between the judgment or order of the Court of Appeal and the civil cause or matter decided by the High Court in the exercise of its original jurisdiction. In the instant case, there clearly was an undisputable connection or relation between the said order of the Court of Appeal and the decision of the trial judge in the High Court;

(d) in law, where an objection to the jurisdiction of a lower court appears on the face of the proceedings, a party who consented to the exercise of the jurisdiction is not thereby estopped from subsequently raising the objection. This is because the jurisdiction of a court of limited jurisdiction cannot be enlarged by any form of estoppel;

(e) estoppel *in pais*, as a matter of law, arises when a person by his conduct or words makes a clear representation of fact either with knowledge of its falsehood or with the intention that it should be acted upon, and the other person has acted upon such representation and thereby altered his position to his prejudice. Here, the question of acting upon the representation to the prejudice of a party did not arise.

The case of *Capital Insurance Bhd v. Kasim bin Mohd Ali* [2000] 1 CLJ 269, which is the second hearing in the Court of Appeal, went on appeal to the Federal Court as *Capital Insurance Bhd v. Aishah bte Abdul Manap & Anor* [2000] 4 CLJ 1. Apparently, there is a slight difference in the name of the respondent's widow the second time around as in the first appeal in the Federal Court, her name is given as Asiah. The respondent raised a preliminary objection in respect of the jurisdiction of the Federal Court to hear the appeal as the subject matter of the appeal was not from the judgment of the Court of Appeal in respect of any civil cause or matter decided by the High Court in the exercise of its original jurisdiction within the meaning of s. 96(a) of the CJA. It was contended that the appeal was in respect of the decision of the Court of Appeal on a preliminary objection taken up on behalf of the respondent before the hearing of the appeal on the merits.

The Federal Court agreed and dismissed the appeal. The judgment of only two members of the panel dated 28 July 2000, as the third member had since retired earlier in that same month, also held that since the preliminary objection related to the question of jurisdiction of the Federal Court to hear appeals from

the Court of Appeal, and noting that at the leave stage the preliminary objection taken by the respondents that the leave application was improper was summarily dismissed by the court, the respondents were entitled to raise this preliminary objection and the court could entertain it.

In *Raja Guppal a/l Ramasamy v. Sagaran a/l Pakiam* [1999] 2 CLJ 972, the appellant prayed for an order for extension of time to file the record of appeal. It was submitted, *inter alia*, that the delay was due to non-compliance with Practice Direction No 1 of 1996, which requires the appellant, in the event of not being provided with the notes of evidence within one month from the date the notice of appeal was filed, to apply immediately to the President of the Court of Appeal for an extension of time. In this case, the appellant had instead wrote to the registrar of the Court of Appeal.

It was held by the Court of Appeal, in dismissing the application, that:

(a) it was erroneous on the part of the appellant's solicitor to contend the need to have the grounds of judgment in order to prepare the memorandum of appeal for inclusion in the record of appeal when para. 5 of Practice Direction No 1 of 1996 allows for the grounds of judgment to be filed as an additional record of appeal without the necessity of filing an application;

(b) Practice Direction No 1 of 1996 has been framed to regulate the procedure governing the filing of the records if appeal. It must be strictly adhered to so that there is a systematic and consistent procedure governing the filing of the records of appeal. The conduct of the appellant's solicitor in not complying with Practice Direction No 1 of 1996 can hardly be described as an acceptable explanation for the delay. Therefore, the court should be slow to exercise its discretion in granting the extension.

Learned counsel for the appellant here submitted that the appeal originated from the High Court and this was the second suit on the same guarantee as the first suit had been struck out. The appellant had applied to strike out the second suit on the grounds of limitation and *res judicata*.

At the continued hearing of the application, the respondent's counsel did not turn up and the learned High Court judge struck out the action in his absence. An application was made to set aside the said order before another High Court judge who granted the order in terms.

On appeal to the Court of Appeal, a preliminary objection was taken that no leave was obtained from the Court of Appeal to file a supplementary record of appeal containing a certified true copy of the order appealed against.

Learned counsel conceded that in fact leave was not secured but the supplementary record of appeal was filed containing a certified true copy of the order appealed against which was also tendered in open court at the hearing of the appeal.

Learned counsel emphasised the fact that they were guided by the Supreme Court Practice Direction No 1 of 1992, modified by the Court of Appeal Practice Direction No 1 of 1995 for the Court of Appeal, that to speed up appeal proceedings, as soon as the appellant receives the sealed order from the High Court, that order may be filed as a supplementary record of appeal without the necessity of making an application. As an alternative, the appellant is allowed to serve a copy of the judgment, decree or order appealed against on the date of hearing of the appeal in open court and the respondent is to be accordingly informed of this.

Learned counsel also submitted that the Court of Appeal has no original jurisdiction and any order made by it must of necessity be in the discharge of its appellate jurisdiction. In that respect, he added, the Federal Court had failed to consider arts. 121 and 128 of the Federal Constitution. He said that s. 96(a) of the CJA cannot be construed to ascertain whether there is jurisdiction on the part of the Federal Court to determine appeals from the decision of the Court of Appeal.

It was the suggestion of learned counsel that the matter could be referred back to the Court of Appeal to be heard on the merits as was done the first time in the *Capital Insurance* case. However, given all the circumstances, he submitted that the Federal Court has the jurisdiction to hear the appeal and that the appeal should be allowed and the order of the Court of Appeal be set aside as both questions should be answered in the positive.

Learned counsel for the respondent, in answer to the submissions of learned counsel for the appellant as regards jurisdiction, referred to *Lee Lee Cheng (f) v. Seow Peng Kwang* [1960] 26 MLJ 1 where the Court of Appeal at p. 3 stated:

> Clause 77 of the Agreement provides that the Supreme Court shall be a Court of unlimited jurisdiction, that it shall consist of a High Court and a Court of Appeal and that its constitution, powers and procedure may be prescribed by Federal Ordinance. Clearly here "jurisdiction" must mean something different from "power". Jurisdiction is unlimited. But unlimited jurisdiction cannot mean unlimited power because as regards the powers of the Court it is provided that these may be prescribed by Federal Ordinance and in the nature of things something which is unlimited cannot be capable of being prescribed. This leads to the conclusion that the expression "jurisdiction" is used as meaning the authority of the Court to exercise any judicial power that is given to it by the law and that when the Clause says that jurisdiction is unlimited it means that there is authority to exercise such judicial power as is given by law in any type of matter whatsoever in which the law authorises or requires power to be exercised.

It was the contention of learned counsel for the appellant that this court has the jurisdiction to determine appeals from any judgment or order of the Court of Appeal which did not originate from the High Court, save and except from any judgment or order of the Court of Appeal which decides whether the Court

of Appeal should or should not grant leave to appeal to the Court of Appeal.

This is enshrined in art. 121(2) of the Federal Constitution and any interpretation of s. 96(a) of the CJA and any other Act of Parliament which is inconsistent with that article is void under art. 4(1) of the Federal Constitution, it being the supreme law of the Federation.

As an apex court, he added, the Federal Court performs the vital function of supervising the process of judicial law making which is an integral part of the common law system and hence the Federal Court has the jurisdiction to correct any erroneous decision of the Court of Appeal except for any decision refusing leave to appeal under s. 68(1)(a) of the CJA, following the filter principle enunciated in the *Auto Dunia* case *(supra)*.

However, learned counsel argued, the Court of Appeal's decision on a procedural point raised in the Court of Appeal for the first time is still appealable subject only to leave being granted by the Federal Court. In the instant case, leave has in fact been granted.

Section 96 of the CJA provides:

> **96. Conditions of appeal.**
>
> Subject to any rules regulating the proceedings of the Federal Court in respect of appeals from the Court of Appeal, an appeal shall lie from the Court of Appeal to the Federal Court with the leave of the Federal Court –
>
> (a) from any judgment or order of the Court of Appeal in respect of any civil cause or matter decided by the High Court in the exercise of its original jurisdiction involving a question of general principle decided for the first time or a question of importance upon which further argument and a decision of the Federal Court would be to public advantage; or
>
> (b) from any decision as to the effect of any provision of the Constitution including the validity of any written law relating to any such provision.

As for para. (a), learned counsel reiterated that even if the appeal here is held not to fall under the first limb, it could still come under the second limb in which this court's jurisdiction is unfettered so long as it satisfies the "question of importance" and "public advantage" test. My immediate response to this argument would be because of the word "involving" joining the two limbs, they cannot be separately applied.

Learned counsel stressed that the Court of Appeal was certainly in error in failing to consider that the appellant had complied with r. 18(4)(d) and r. 18(7) of the RCA when he tendered a sealed copy of the order appealed from in open court before the hearing of the appeal in the Court of Appeal pursuant to the Supreme Court Practice Direction No. 1 of 1992 as adopted for appeals in the Court of Appeal *vide* Court of Appeal Practice Direction No. 1 of 1995.

He added that the facts in *Capital Insurance Bhd v. Kasim bin Ali* the second time around were distinguishable as the appellant here, in making use of the alternative procedure, relied on the second limb of the Supreme Court Practice Direction No. 1 of 1992 which allows the appellant to tender a copy of the sealed order appealed against in open court on the hearing date of the appeal, unlike the earlier case which only relied on the first limb of the relevant practice direction.

He continued his submissions by stating that as provided in Part IV of the RCA at r. 104, any objections to irregularity shall be stated in the summons or notice of motion for either non-compliance with the rules or to set aside any proceedings for irregularity under r. 102 and r. 103 of the RCA respectively. The Court of Appeal should not have entertained the preliminary objection here orally and the delay in making the objection is fatal. In any case, he argued that the so called defect is a mere irregularity curable under r. 102 of the RCA.

Further, he reiterated that the so called irregularities are not prejudicial to the respondent for the following reasons:

(a) there is absolutely no dispute over the contents of the order appealed against;

(b) the appellant has already filed and served the record of appeal which contains a photocopy of the sealed order appealed against and the genuineness of the said photocopy was never in dispute;

(c) the appellant had also filed and served the supplementary record of appeal which contains the certified true copy of the sealed order appealed against;

(d) in addition, the appellant had in fact tendered a certified true copy of the sealed order appealed against on 20 September 2000 in open court when the appellant's appeal was called up; and

(e) thus, the respondent has not been misled as to what was the order appealed against nor in any way prejudiced by the fact that a photocopy of the sealed order appealed against was included in the record of appeal.

Learned counsel also submitted that the Federal Court has the jurisdiction to correct any erroneous decision of the Court of Appeal, with the exception of any decision refusing leave to appeal under s. 68(1)(a) of the CJA of which the filter principle as enunciated in *Auto Dunia* would apply. The jurisdiction cannot be curtailed as it is crucial for an effective check and balance system to operate. Otherwise, there could well be a situation where the Court of Appeal may arrive at a different decision from that of the Federal Court, resulting in uncertainty of the law, especially procedural law.

For instance, if the Federal Court has a limited supervisory role over the Court of Appeal, the Court of Appeal may formulate erroneous decisions regarding the RCA and the Federal Court would be powerless to set the law right. Similarly, any purported exercise of discretion by the Court of Appeal pursuant to the RCA, even if wrongfully and improperly exercised, would never be subject to the Federal Court's scrutiny and review.

The reply from learned counsel for the respondent was that during the argument at the leave stage on 17 April 2001, they had contended that the application for leave by the appellant was improper under s. 96(a) of the CJA but it was dismissed.

That, however, did not prevent him from raising it again as this court has no jurisdiction to hear the appeal. This was because this court did not decide the issue of jurisdiction on the merits at the leave stage. Instead, this court considered the appropriateness of matters raised for appeal becoming the subject of appeal.

Reliance was made on *Capital Insurance Bhd. v. Aishah bt Abdul Manap (supra)* where the court held:

> In our view, there is much force in the submission. Since the preliminary objection relates to the question of jurisdiction of the Federal Court to hear appeals from the Court of Appeal, and noting that at the leave stage the preliminary objection taken by the respondents that the leave application was improper was summarily dismissed by this court, the respondents are entitled to raise this preliminary objection and this court can entertain the application.

Reverting to the facts on this case, learned counsel for the respondent submitted that the respondent had filed the action against the appellant as guarantor to a RM500,000 overdraft facility granted to Wira Kris Agricultural Services Sdn. Bhd. The appellant filed his defence and also applied to strike out the respondent's writ by way of summons-in-chambers.

The application was part-heard but the learned counsel for the respondent was absent at the continued hearing on 17 September 1994. The High Court proceeded with the matter and gave the order in terms of the appellant's application.

The respondent then filed an application to set aside the order granted and also to amend the summons-in-chambers. On 20 October 1998, the court allowed both applications and for the first application, reinstated the matter for rehearing. The appellant accordingly appealed to the Court of Appeal.

It was not disputed in the Court of Appeal that the record of appeal was filed within time but it did not include a sealed copy of the order granted on 20 October 1998. The appellant had also not obtained the leave of the court to include a sealed copy of the order in the supplementary record of appeal.

Learned counsel for the appellant's argument was that it would suffice if the appellant were to tender the sealed copy of the court order at any time before the hearing of the appeal which he had done in compliance with the Supreme Court Practice Direction No. 1 of 1992.

However, the Court of Appeal disagreed with him as the appellant had failed to obtain leave to file the supplementary record of appeal out of time. They upheld the preliminary objection and, since there was no proper appeal before it, struck out the appeal with costs.

Learned counsel for the respondent reiterated that the subject matter of this appeal is not "any civil cause or matter decided by the High Court in the exercise of its original jurisdiction" as it relates to an issue arising from a preliminary objection raised by the respondent at the hearing before the Court of Appeal. Accordingly, it does not fall within the ambit of s. 96(a) of the CJA.

In *Lam Kong Company Ltd v. Thong Guan Co Pte Ltd (supra)*, the majority judgment of the Federal Court said:

> On the true construction of section 96(a), we form the view that the judgment or order of the Court of Appeal to appeal from must be in respect of a cause or matter decided by the High Court on the merits and not in respect of interlocutory judgment or order decided by the Court of Appeal upon the hearing of an application made to it in a pending appeal before it. Unless there is an express provision that an appeal shall lie from the Court of Appeal to this Court from its interlocutory judgment or order in respect of a matter pending appeal before it, by necessary intendment of section 96(a) the interlocutory judgment or order of the Court of Appeal is not appealable and does not come within the meaning of section 96(a) of the Act.

In another part of the judgment, they held:

> In our view, based on the above statement of principles and in the context of section 96(a) of the Act, it is laudable, as a matter of policy, to restrict the right of appeal from the Court of Appeal to the Federal Court with leave only to cases where the judgment or order of the Court of Appeal is in respect of any civil case or matter decided by the High Court on the merits. If a decision of the Court of Appeal made on a motion in a pending appeal is appealable, then the result would be that there would be two appeals in every case 'in which, following the ordinary cause of things, there would only be one'. Hence, the policy of requiring leave to appeal under section 96(a) to act as a 'filter' against unnecessary appeals would be defeated.

Learned counsel for the respondent remarked that the question of injustice would not be the proper test. Even if the court considers that to be the test, the background of the case determines whether the appellant is indeed prejudiced. In this case, the appellant is not at all prejudiced for the simple reason that the striking out of the application in the High Court is still due for rehearing pursuant to the decision of the High Court judge when he ordered

the setting aside of the earlier order to strike out. The appellant's rights are not exhausted or shut out or in any way prejudiced as he can still proceed to argue his case at the rehearing before the High Court.

As for the second limb of s. 96(a) of the CJA, learned counsel for the respondent referred to the judgment in *Datuk Syed Kechik bin Syed Mohamed & Anor v. The Board of Trustees of the Sabah Foundation & Ors* [1999] 1 CLJ 325 where the relevant extract reads:

> To sum up, without prejudice to the generality of what we have thus far said, the Federal Court exercises its sensitive power to grant leave to appeal in civil cases sparingly and will not grant such leave unless both of the following criteria are satisfied by an intending appellant:
>
> (1) the judgment of the Court of Appeal has raised a point of general principle which the Federal Court has not previously decided or a point of importance upon which further argument and a decision of the Federal Court would be to public advantage; and
>
> (2) if the point is decided in favour of the intending appellant, there is a *prima facie* case for success in the appeal.

Learned counsel reminded us that this issue is not being decided for the first time in view of the decision in the two earlier *Capital Insurance* cases. Here, the appellant made no attempt to file or to get leave to file a supplementary record of appeal containing a sealed or a certified true copy of the order appealed against. It is obvious, he added, that the Court of Appeal had already considered the effect of the second limb of s. 96(a) of the CJA. In any case, he submitted, practice directions have no statutory authority.

Rule 18(4)(d) of the RCA clearly states that the appellant shall attach to the memorandum of appeal a copy of the judgment, decree or order appealed from. On this point, I would readily agree with the decision in the Court of Appeal in *Capital Insurance Bhd. v. Kasim bin Mohd. Ali* the first time around, although I am aware that only a draft judgment was enclosed there, when it held that since the relevant provision refers to "a copy of the judgment, decree **or** order" and a copy of the judgment has in fact been attached to the memorandum of appeal and is part of the record of appeal here, that rule has been complied with although a copy of the order has not been so included. As decided in that case, there is certainly no merit to the preliminary objection. Things, of course, would be different if the words were "a copy of the judgment, decree **and** order".

Rule 18(7) of the RCA provides that the memorandum of appeal and the copies of the documents specified in r. 18(4) thereof shall be called the record of appeal and shall be filed at the registry within six weeks after the entry of the appeal or within such future time as the court may allow. Since a copy of the judgment has been included in the record of appeal, and since it was

filed within the three weeks allowed on 21 December 1998 from the date of receipt of the notes of evidence and the grounds of judgment, there cannot be any doubt that the record of appeal is in order.

On these grounds alone, the preliminary objection fails.

However, in view of the respondent's persistence on this preliminary objection, let us just say that a copy of the judgment was also not included in the record of appeal. As the learned counsel for the appellant has argued, they were relying on the relevant practice direction which is the Supreme Court Practice Direction No. 1 of 1992 dated 17 June 1992.

The same provisions have been modified for the Court of Appeal *vide* their Practice Direction No. 1 of 1995 dated 24 June 1994. If we were to revert to the sequence of events in this appeal, it is crystal clear that the appellant has followed the practice direction to the letter.

But the Supreme Court decision in *Ooi Bee Tat v. Tan Ah Chim & Sons Sdn Bhd & Anor & Anor Appeal* [1995] 4 CLJ 484 held that unlike standing orders which are made pursuant to relevant Acts, and which are similar to subsidiary legislation and therefore have the same status as the Rules of the Supreme Court or the Rules of the High Court, Practice Notes or Practice Directions have no statutory authority. Practice Directions are merely directions for administrative purposes.

In that same month, the Court of Appeal in *Yeo Yoo Teik v. Jemaah Pengadilan Sewa P Pinang & Anor* [1996] 2 CLJ 628 decided that although Practice Direction 2/91 does not have the force of law, it must be strictly adhered to as it has been especially framed to regulate the procedure governing the filing of the records of appeal. Three years later, the Court of Appeal in the *Raja Guppal a/l Ramasamy* case *(supra)* was of the view that the provisions of the Practice Direction No. 1 of 1996 must be strictly followed to ensure that there is a systematic and consistent procedure governing the filing of the records of appeal. It further ruled that the conduct of the appellant's solicitor in not complying with that Practice Direction was not an acceptable explanation for the delay in filing the record of appeal. Four months before that, the Court of Appeal in *Ling Siok Seng v. Ting Sieh Chung* [1998] 4 CLJ 169 said that as regards the fact that the appellant had still not received the notes of proceedings, the appellant should have complied with the Court of Appeal's Practice Direction No. 1 of 1996 and there was no evidential material to explain the appellant's failure to do so. Even in the *Capital Insurance* appeal in the Court of Appeal the second time around, the court had ruled that rules and practice directions made by the court are to be obeyed and not to be broken and parties to an appeal must adhere and comply strictly to those rules and directions.

Apart from the reassuring findings of the four Court of Appeal decisions, I would venture to say that the decision in *Ooi Bee Tat (supra)* cannot be correct. This is because practice directions would have the force of law as they are made under the relevant rules. Rule 77 of the RCA states:

> The President may from time to time give such directions with respect to the business in the Registry, as he may consider necessary.

Rule 138 of the Rules of the Supreme Court 1980, by which the present facts of this case are governed, provides:

> The Lord President may from time to time give such directions with respect to the business in the Registry, as he may consider necessary.

In fact, even with that being repealed by the Rules of the Federal Court 1995, r. 110 thereof has a similar provision which reads:

> The Chief Justice may from time to time give such directions with respect to the business in the Registry, as he may consider necessary.

Having analysed the relevant authorities and considered the arguments, for the reasons stated earlier, it is my view that the record of appeal was in fact in order as there was already a copy of the grounds of judgment enclosed therein. Further, placed in the predicament the appellant was in, they had duly complied with the relevant practice direction, which I hold to have the force of law, when the certified true copy of the order, the contents of which had never been challenged, was filed in the supplementary record of appeal within a few days of receiving it without making any application, and also by tendering the said copy at the hearing of the appeal after duly informing the respondent.

In view of the words "save and except from" appearing therein, I am somewhat perplexed by the first question posed as there are two limbs and reading it once results in it sounding ambiguous. One cannot be sure which limb is supposed to be the exception to the other. Taken as a whole, it does not seem to make any sense. It would have sufficed if the question was framed to cover the second limb only as it should be clear that the first limb is accepted to be in the negative in view of the law while the second limb forms the exception. On the other hand, the words "save and except from" could be taken to mean "other than", which then makes the first limb the exception. Whichever limb is taken to answer the question posed, my answer would be in the negative as either one goes against the grain of s. 96 of the CJA and the decided authorities discussed earlier. For the second question, my answer would be in the positive as I hold that a practice direction has the force of law and the appellant has duly complied with it.

Accordingly, I would allow the appeal with costs here and in the Court of Appeal. The deposit is refunded to the appellant. The matter is remitted back to the Court of Appeal before another panel for a rehearing on the merits.

Ahmad Fairuz FCJ:

On 17 April 2001 the appellant was granted leave to appeal to this court on the following questions:

(1) Whether the Federal Court has the jurisdiction to determine appeals from any judgment, order or decision of the Court of Appeal which did not originate from the High Court save and except from any judgment, order or decision which is on whether the Court of Appeal should or should not grant leave to appeal to the Court of Appeal.

(2) Whether an appellant who is entitled to appeal to the Court of Appeal has complied with rr. 18(4)(d) and (7) of the Rules of the Court of Appeal 1994 when he tenders a sealed copy of the order appealed from before the hearing of the appeal in the Court of Appeal in compliance with the Supreme Court's Practice Direction No. 1 of 1992 (adopted for appeals to the Court of Appeal *vide* Court of Appeal Practice Direction No. 1 of 1995).

The appeal by the appellant was against the decision of the Court of Appeal which upheld the preliminary objection of the respondent. The thrust of the objection was the non-compliance by the appellant of r. 18(4)(d) and r. 18(7) of the Rules of the Court of Appeal 1994 (RCA) when he included in the appeal record the photocopy of the sealed order appealed against and when he filed without leave of the court the supplementary appeal record that incorporated in it the certified true copy of the order. Consequently the Court of Appeal held that the appeal record was defective and as such there was no proper appeal before it. The appeal was then struck out with costs. It is clear, at this stage, that the decision of the Court of Appeal is not "... in respect of any civil cause or matter decided by the High Court ..." but is obviously on a matter pertaining to the rules of procedure of the Court of Appeal. The matter of non-compliance with the RCA is never a cause or matter decided by the High Court as stipulated in s. 96(a) of the Courts of Judicature Act 1964 (CJA). That section reads:

> Conditions of appeal
>
> Subject to any rules regulating the proceedings of the Federal Court in respect of appeals from the Court of Appeal, an appeal shall lie from the Court of Appeal to the Federal Court with the leave of the Federal Court:
>
> (a) from any judgment or order of the Court of Appeal in respect of any civil cause or matter decided by the High Court in the exercise of its original jurisdiction involving a question of general principle decided for the first time or a question of importance upon which further argument and a decision of the Federal Court would be to public advantage;

In *Capital Insurance Bhd. v. Aishah bt Abdul Manap* [2000] 4 CLJ 1 (Capital Insurance) the Federal Court was also then considering a similar case of non-compliance of r. 18(4)(d) and r. 18(7) RCA. Rule 18(4)(d) states:

18(4) The appellant shall attach to such memorandum copies of the proceedings in the High Court, including –

(a)-(c) xxx

(d) a copy of the judgment, decree or order appealed from;

(e)-(f) xxx

Rule 18(7) says:

18(7) The memorandum and copies above referred to which, together shall be called the record of appeal, shall be filed at the Registry within six weeks after the entry of the appeal or within such further time as the Court may allow.

The appeal record in that case did not contain the sealed copy of the judgment of the court below and a copy of the order of the court. On the appeal before it, the Federal Court said:

Accordingly, after considering the background facts and the authorities, we agree with counsel for the respondents that the present appeal is from the decision of the Court of Appeal on a preliminary objection taken by the respondents in which the court held that the appeal record and the supplementary appeal record were defective for non-compliance of r. 18(4)(d) and (7) of the Court of Appeal Rules 1994. As was stated in *Auto Dunia Sdn. Bhd. v. Wong Sai Fatt & Ors.* [1995] 3 CLJ 485 *it is an elementary proposition that this court is a creature of statute and that equally a right of appeal is also a creature of statute, so that unless an aggrieved party can bring himself within the terms of a statutory provision enabling him to appeal, no appeal lies.* Thus, it is patently clear that the subject-matter of the present appeal is not from the judgment of the Court of Appeal in respect of the cause or matter decided by the High Court in the exercise of its original jurisdiction. (emphasis added)

The Federal Court then made reference to its earlier decision in the case of *Lam Kong Co. Ltd. v. Thong Guan Co. Pte. Ltd.* [2000] 3 CLJ 769 wherein the Federal Court (in a majority decision) held that "the judgment or order of the Court of Appeal which is appealable to the Federal Court must be in respect of a cause or matter decided by the High Court on the merits and not in respect of interlocutory judgment or order decided by the Court of Appeal upon the hearing of an application made to it in a pending appeal before it." *Lam Kong*'s case involves an appeal filed in the Court of Appeal without leave of the court. Leave was necessary under s. 68(1)(a) CJA as the value of the subject matter of the appeal was less than RM250,000. The Court of Appeal had allowed the respondent's application to strike out the appeal. The applicant then appealed to the Federal Court against that decision.

Before us, the learned counsel for the appellant argued that the interpretation of s. 96(a) CJA by the Federal Court in *Capital Insurance* case was made *per incuriam*. This meant, contended the appellant, that the interpretation was

made in the words of Sir Raymond Evershed MR in *Morelle v. Wokeling* [1955] 2 QB 379 at 406 "in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding in the court concerned, so that in such cases, some part of the 'interpretation' or some step in the reasoning on which it is based, is found on that account to be demonstrably wrong". The learned counsel submitted that the interpretation is inconsistent with art. 121(2) of the Federal Constitution. That article reads:

> There shall be a court which shall be known as the Mahkamah Persekutuan (Federal Court) and shall have its principal registry in Kuala Lumpur, and the Federal Court shall have the following jurisdiction, that is to say:
>
> (a) jurisdiction to determine appeals from decisions of the Court of Appeal, of the High Court or a judge thereof;
>
> (b) such original or consultative jurisdiction as is specified in Articles 128 and 130; and
>
> (c) such other jurisdiction as may be conferred by or under federal law.

And, by virtue of art. 4(1) of the Federal Constitution which says:

> This Constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void.

the interpretation is, according to counsel, void.

In response to this argument of the appellant, the learned counsel for the respondent referred us to art. 128(3) Federal Constitution which clearly says that "the jurisdiction of the Federal Court to determine appeals from the Court of Appeal ... shall be such as may be provided by federal law." And the CJA is such federal law (*Lye Thai Sang v. Faber Merlin (M) Sdn. Bhd.* [1985] 2 CLJ 423; [1985] CLJ (Rep) 196). Thus, I agree with the respondent that art. 121(2) Federal Constitution must be read subject to art. 128(3) Federal Constitution (Andrew Harding's *Law, Government and the Constitution in Malaysia* at p. 128). As I had stated earlier, the subject matter of the appeal now before us clearly falls outside the ambit of s. 96(a) CJA. To me, the meaning of the words used in s. 96(a) is plain, clear and unambiguous. The Supreme Court of India in *Hiralal Ratan Lal v. The Sales Tax Officer, Section III, Kanpur* (AIR) [1973] SC 1034 at 1039 had said:

> In construing a statutory provision, the first and the foremost rule of construction is the literary construction. All that we have to see at the very outset is what does that provision say? If the provision is **unambiguous** and if from that provision, the legislative intent is clear, **we need not call into aid** the other **rules of construction** of statutes. The other rules of construction of statutes are called into aid only when the legislative intent is not clear. (emphasis added)

Our Federal Court in the case of *Public Prosecutor v. Sihabduin & Anor.* [1980] 2 MLJ 273 at 275 said:

> Thirdly, if the law-maker so amends the law, to paraphrase the words of Lord Diplock at page 541 in *Duport Steels Ltd. v. Sirs* [1980] 1 All ER 529, the role of the judiciary is confined to ascertaining from the words that the law-maker has approved as expressing its intention what that intention was, and to giving effect to it. Where the meaning of the words is plain and unambiguous *it is not for judges to invent fancied ambiguities as an excuse for failing to give effect to its plain meaning because they themselves consider that the consequences of doing so would be inexpedient, or even unjust or immoral;* or to paraphrase the words of Lord Scarman at page 551 in the same case, in the field of statute law the judge must be obedient to the will of the law-maker as expressed in its enactments, the judge has power of choice where differing constructions are possible, but he must choose the construction which in his judgment best meets the legislative purpose of the enactment. *Even if the result be unjust but inevitable, he must not deny the statute; unpalatable statute law may not be disregarded or rejected, simply because it is unpalatable; the judge's duty is to interpret and apply it.* (emphasis added)

In the case of *Chin Choy & Ors. v. Collector of Stamp Duties* [1979] 1 MLJ 69 at 70, the Federal Court said:

> It may be apposite at this stage to recall certain basic principles in the interpretation of statutes. **Applying the words and phrases of a statute in their ordinary meaning has been said to be the first and most elementary rule of construction** and the second is said to be to construe the phrases and sentences according to the rules of grammar.
>
> **It is very desirable in all cases to adhere to the words of an Act of Parliament, giving to them that sense which is their natural import** in the order in which they are placed. per Bayley J in *R. v. Ramsgate (Inhabitants)* [1827] 6 B&C 712. (emphasis added)

In 1946, Willan CJ in *Yeo Peck Chie v. K.S. Gill & Co.* [1946] MLJ 131 at 133 said:

> **In interpreting the provisions of a statute, one of the cardinal rules is to adhere as closely as possible to the literal meaning of the words.** If an authority is required for this, it will be found in the case of *Abbott v. Middleton* [1858] 7 HLC 114). **Once the literal meaning has been established then, however unjust, arbitrary or inconvenient such meaning may be, it must receive its full effect** – see *Biffin v. Yorke* (5 Man & G 428). Nor is it the function of the Court to scan the wisdom or policy of a statute – see *May v. The Great Western Railway Co* (41 LJQB 104). (emphasis added)

In the light of the aforementioned authorities, I am satisfied that the literal meaning of the words used in s. 96(a) is very clear. I find no ambiguities in s. 96(a). As such the answer to question (1) has to be that the Federal Court has no jurisdiction to determine appeals from any judgment, order or decision

of the Court of Appeal which is not in respect of any civil cause or matter decided by the High Court in the exercise of its original jurisdiction. And as the subject matter of question (2) has nothing to do with the civil cause or matter decided by the High Court in the exercise of its original jurisdiction, I would be contradicting myself with what I had held in my answer to question (1) if I were to proceed to consider the second question. In the circumstances, I would dismiss the appeal with costs.

Mohtar Abdullah FCJ:

This is a simple case and the facts have been plainly set out in the Court of Appeal judgment delivered by Mohd Saari Yusoff, JCA (the learned JCA) as follows:

> 1. In this appeal, the 1st defendant (hereinafter referred to as "the appellant") is dissatisfied with the order of the High Court granted on 20 October 1998.
>
> **Factual background**
>
> 2. The respondent filed this action against the appellant who stood as a guarantor of an overdraft facility for RM500,000.00 granted to one Wira Kris Agricultural Services Sdn Bhd ("the Borrower"). The appellant filed his defence and also filed summons in chambers (SIC) for an Order under O. 18 r. 19(1)(b) and (c) RHC 1980 to strike out the respondent's writ and statement of claim.
>
> 3. SIC was part-heard but on the date of its continued hearing on 17 September 1994, the respondent's counsel was absent. The Court proceeded with the hearing and granted the application to strike out the respondent's writ and statement of claim.
>
> 4. Subsequently, the respondent filed 2 applications:
>
> (i) an application to set aside the order granted on 17 September 1994;
>
> (ii) an application to amend SIC (enclosure 16).
>
> On 20 October 1998, the Court allowed both applications. Against that order, the appellant appeals to this Court.
>
> 5. It is not in dispute that the main appeal record was filed within time, which appeal record did not include sealed copy of the Order granted on 20 October 1998. From the last date of filing the appeal record to this date (20 September 2000), there is a lapse of about 1 1/2 years.
>
> 6. The learned counsel for the respondent raised a preliminary objection on the ground that the appellant had not obtained leave to include in the appeal record the sealed copy of the Court Order granted on 20 October 1998.
>
> **Issue**
>
> 7. Issue for determination is whether the appeal is properly before the Court.

After referring to the provisions of r. 18(4) and (7) of the Rules of the Court of Appeal 1994 ("the RCA"), the learned JCA noted the argument of the appellant that for the purpose of tendering the sealed copy of the court order,

it would suffice if the appellant were to tender the sealed copy of the court order at any time before the hearing of the appeal in the Court of Appeal as provided for in Practice Direction No. 1 of 1992. The learned JCA referred to the Court of Appeal decision in *Capital Insurance Bhd v. Kasim bin Mohd Ali* [2000] 1 CLJ 269, at p. 276:

> Is clear to us that the Practice Direction allowed an appellant to file without leave a sealed copy of the order not received with the notes of the evidence and the judgment in a separate bundle which is called the supplementary appeal record when the order was not received in time and it must be done as soon as the appellant received the sealed copy of that order. Nowhere is it stated in the Practice Direction that if it is not done in time (reasonable time after receiving the sealed copy of the order) that it could be filed without leave of the court. The onus is on the appellant to show that the supplementary appeal record was filed soon after it received the sealed copy of order. Rule 18(7) makes it clear that all filing of documents must be done within the stipulated time. It is imperative to us that an appellant is not allowed to file the supplementary appeal record at any time it likes just because of the Practice Direction. **In our view whatever supplementary appeal record to be filed pursuant to that Practice Direction, it must be done within the stipulated time otherwise leave of the court must be obtained.** In this appeal the appellant has not satisfied us that the supplementary appeal record was filed in time. In our opinion the failure on the part of the appellant to apply for leave to file out of time is fatal.

Relying on the abovementioned judgment, the learned JCA then made the following decision:

> On the facts of the instant case, as the appellant had failed to obtain leave to file supplementary record of appeal out of time, we upheld the preliminary objection by the respondent. Consequently we held that there was no proper appeal record before us to consider. This appeal was struck off with costs.

The result of this simple case has a not-so-simple consequence on the rights of the appellant to pursue his appeal on the merits in the Court of Appeal and thereafter to the Federal Court. The appellant successfully obtained leave of the Federal Court to appeal against this decision of the Court of Appeal on two questions of laws as follows:

> **1st Question:** Whether the Federal Court has the jurisdiction to determine appeals from any judgment, order or decision of the Court of Appeal which did not originate from the High Court save and except from any judgment, order or decision which is on whether the Court of Appeal should or should not grant leave to appeal to the Court of Appeal?
>
> **2nd Question:** Whether an appellant who is entitled to appeal to the Court of Appeal has complied with rr. 18(4)(d) and (7) of the Rules of the Court of Appeal 1994 when he tenders a sealed copy of the order appealed from

before the hearing of the appeal in the Court of Appeal in compliance with the Supreme Court Practice Direction No. 1 of 1992 (adopted for appeals to the Court of Appeal *vide* Court of Appeal Practice Direction No. 1 of 1995)?

I will deal with the 2nd Question first. Let us examine the provisions relevant to this question, *viz.* r. 18(4) and (7) of the RCA and the Supreme Court Practice Direction No. 1 of 1992/Court of Appeal Practice Direction No. 1 of 1995.

Rule 18 of the RCA sets out the various procedural requirements that must be complied with in the preparation of a memorandum of appeal. Rule 18(4) provides:

(4) The appellant shall attach to such memorandum copies of the proceedings in the High Court, including –

(a) copies of the documents in the nature of pleadings, so far as is necessary for showing the matter decided and the nature of the appeal;

(b) a copy of the Judge's note of the hearing of the cause or matter in which the decision appealed against was given;

(c) copies of all affidavits read and of all documents put in evidence in the High Court so far as they are material for the purposes of the appeal, and subject to rule 101 if such documents are not in the national language, copies of certified translations thereof;

(d) a copy of the judgment, decree or order appealed from;

(e) a copy of the written judgment or grounds of decision of the Judge, or a copy of the agreed notes of judgment as prepared by the parties and approved by the Judge, if such written judgment, grounds of decision or agreed notes as approved is made available within the time limited for filing the record of appeal, provided that if the Court so orders, the absence of the written judgment, grounds of decision or agreed notes shall not prevent the appellant from proceeding with his appeal, and

(f) a copy of the notice of appeal.

Rule 18(7) further provides:

(7) The memorandum and copies above referred to, which together shall be called the record of appeal, shall be filed at the Registry within six weeks after the entry of the appeal or within such further time as the Court may allow.

It is very clear from these provisions of the RCA that the relevant documents, including the copy of the court order dated 20 October 1998 (the order appealed against) must be filed by the appellant within six weeks after the entry of the appeal or "within such further time as the court may allow" which means, of course, that the appellant must apply to the Court of Appeal for leave to file the relevant document out of time. In short, on the facts of the present case, the appellant who has filed everything in time, except for that copy of the court order, must apply to the court for leave to file the said court

order out of time. Rules are rules! They must be obeyed. Numerous judgments can be cited in support of this firm stand on the necessity for a strict adherence of the rules. I agree. However, a judge should not be so besotted by the rules that his sense of justice and fairness becomes impaired because of his blinkered fixation on technicalities of the rules and the cold letter of the law. The judge should be mindful of r. 102 of the RCA which provides that "non-compliance with any of these rules, or with any rule of practice for the time being in force, shall not render any proceedings void." The said rule also provides for the discretionary power of the judge to deal with such irregularity "in such manner and upon such terms" as the judge thinks fit. Therefore, a fair minded judge should look at all the circumstances of the case before penalising the party who infringes any particular rule of procedure. After all r. 18(7) of the RCA itself provides an avenue for the appellant to apply to the court for extension of time. If the appellant fails to do so, he should not be peremptorily dismissed. The court should consider why the appellant acted in the manner he did. In this case, the appellant was relying on the Court of Appeal's own Practice Direction which allows alternative procedures for the filing or submission of the copy of the court order. The Court of Appeal should properly examine its own Practice Direction and consider the matter in the light of the RCA as modified by the Practice Direction.

The strict procedural requirements of r. 18 have been mitigated by the Court of Appeal Practice Direction No. 1 of 1995 (adopting and modifying The Supreme Court Practice Direction No. 1 of 1992) which, with the relevant modifications, now reads as follows:

> Di bawah peruntukan Kaedah 18(4)(d) Kaedah-Kaedah Mahkamah Rayuan 1994, seseorang perayu adalah dikehendaki menyertai satu salinan penghakiman, dekri atau perintah yang dirayu ke dalam Rekod Rayuan.
>
> Sehubungan dengan itu didapati kebanyakan perayu tidak mematuhi peruntukan tersebut dan ini melambatkan penetapan kes-kes rayuan di Mahkamah Rayuan.
>
> Untuk menyegerakan prosiding rayuan di Mahkamah Rayuan, *sebaik sahaja perayu menerima perintah termeterai dari Mahkamah Tinggi, perintah tersebut bolehlah difailkan sebagai rekod rayuan tambahan tanpa sebarang permohonan.*
>
> *Sebagai alternatif, perayu dibenar menyerahkan salinan penghakiman, dekri atau perintah yang dirayu pada hari perbicaraan rayuan di dalam Mahkamah Terbuka.* Pihak Penentang sewajarnya diberitahu di atas penyerahan ini.

The Court of Appeal itself has recognised that most appellants have not complied with the provisions of r. 18(4)(d) and (7) of the RCA which requires a copy of the judgment, decree or order to be included in the Record of Appeal which must be filed within six weeks after entry of the appeal. Therefore, in order to overcome this problem and to expedite the appeal process in the Court

of Appeal the Practice Direction provides that as soon as the appellant receives the sealed order from the High Court, the said order can be filed as a supplementary record of appeal sans application ie, there is no necessity for the appellant to file any application to submit the court order as a supplementary record of appeal. Let me pause here. The phrase "as soon as the appellant receives the sealed order from the High Court" ("sebaik sahaja perayu menerima perintah termeterai dari Mahkamah Tinggi") does not come with any qualifying time frame – the court order may well be received within the six week period for filing the record of appeal or, as commonly happen, it may have been received after the expiry of the said period. It must be stressed that the Practice Direction addresses the specific problem of delay in obtaining and filing copies of judgment, decree or order – a delay that invariably emanates from the court (the judge or the registry). The appellant cannot be penalised for any delay on the part of the court to issue the sealed order. Its trite law. This particular Practice Direction is the common sense solution to expedite the appeal process, to overcome delay caused in the first place by the court's own delay in issuing the relevant judgment, decree or order required to be filed in the record of appeal. In effect, the Practice Direction modifies the procedure in r. 18 of the RCA in the special case of documents specified in r. 18(4)(d) only. In respect of such documents there is clearly no necessity to make an application for leave to file the supplementary record of appeal. The phrase "bolehlah difailkan ... tanpa sebarang permohonan" is exceedingly clear: to impose a requirement for "permohonan" for leave to file such supplementary record would be to negate what the Practice Direction seeks to remedy. The Court of Appeal, on several occasions, has observed that although Practice Directions have no statutory authority or force of law, they must be strictly adhered to as they have been specially framed to regulate specific procedures such as filing of appeal records, etc. (see *Yeo Yoo Teck v. Jemaah Pengadilan Sewa P Pinang & Anor* [1996] 2 CLJ 628; *Ling Siok Seng v. Ting Sieh Chung* [1998] 4 CLJ 169; *Raja Guppal a/l Ramasamy v. Sagaran a/l Pakiam* [1999] 2 CLJ 972).

The alternative procedure set out in the Practice Direction provides an even simpler solution to the problem: "Sebagai alternatif, perayu dibenar menyerahkan salinan penghakiman, dekri atau perintah yang dirayu pada hari perbicaraan rayuan di dalam Mahkamah Terbuka". As an alternative, the appellant is allowed to submit a copy of the judgment, decree or order appeal against on the day of hearing of the appeal in open court. The only qualification is the professional ethical requirement of informing the respondent accordingly. This aspect of the Practice Direction was not dealt with by the Court of Appeal in *Capital Insurance Bhd v. Kasim bin Mohd Ali (supra)* and is similarly overlooked by the learned JCA in this case.

As the then Supreme Court noted in *Ooi Bee Tat v. Tan Ah Chim & Sons Sdn Bhd & Anor* [1995] 4 CLJ 484, Practice Directions are directions for administrative purposes and have no statutory authority. They are framed to provide administrative guidelines for the proper implementation of the procedural rules. They help to clarify or highlight existing rules for proper compliance of the said rules as set out in the relevant Court Rules or the relevant Act of Parliament. The problem is that this particular Court of Appeal Practice Direction No. 1 of 1995 goes beyond its administrative purview as it provides for substantial deviations from the strict procedural rules set out in r. 18 of the RCA. The fault lies with the framers and issuer of the Practice Direction. A rule of court cannot be amended by an administrative direction. Rule 18 of the RCA should have been modified and amended accordingly to accommodate the two alternative procedures sought to be introduced by the said Practice Direction. Perhaps, the Chief Justice and/or the Rules Committee might wish to review the various Practice Directions affecting the High Court, Court of Appeal and Federal Court and, where such directions have the effect of changing or modifying procedural rules set out in the relevant Court Rules, then the relevant Court Rules should be amended or modified accordingly. It is clear that Practice Directions, with no statutory authority, cannot supersede the relevant Court Rules or the relevant Act of Parliament. But where, as in the present case, the existence of the Practice Direction and its reliance or compliance by a litigant leads to the litigant being punished for his reliance or compliance of the selfsame direction by the court, then surely there is a case for any judge or court to exercise judicial discretion to prevent injustice.

In my judgment, the Court of Appeal is clearly wrong in upholding the preliminary objection by the respondent that the appellant had failed to obtain leave to file the supplementary record of appeal out of time. The order of striking out the appeal with costs is erroneous. I have no hesitation in answering the 2nd Question in the positive. On this question alone, the appeal can be allowed and the case should be remitted to the Court of Appeal for hearing on the merits.

In view of my finding on the 2nd Question, is there any necessity for this court to specifically answer the 1st Question? This is a clear case where injustice has been done to the appellant who has been denied his right to have his appeal heard on its merit. This court has "the inherent powers to hear any application or to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the court." (See r. 137 of the Rules of the Federal Court 1995). Litigants who come to court and obey its directions should not be punished for such obedience. And if unfortunately, on the rare occasion a litigant is unjustly punished, this court does have the jurisdiction and the power to correct that injustice.

Substantial justice having been done by restoring the appellant's right to appeal in the Court of Appeal, I think it is neither necessary nor appropriate on the peculiar facts of this case to answer the 1st Question and, in the process, making an excursion into the law to review the Federal Court decision in *Lam Kong Co Ltd v. Thong Guan Co Pte Ltd* [2000] 3 CLJ 769 *(Lam Kong)*, which was re-affirmed by the Federal Court in *Capital Insurance Berhad v. Asiah binti Abdul Manap & Another* [2000] 4 CLJ 1 *(Capital Insurance)*, though counsels have argued extensively on this issue in the course of their submissions on the 1st Question. For the present moment, I would like to briefly state that I find it quite difficult to agree with the majority judgment in *Lam Kong*. I am personally much more persuaded by the dissenting opinion expressed therein by His Lordship Tan Sri Chong Siew Fai, the then Chief Judge (Sabah & Sarawak).

The Court of Appeal is created to confer any litigant dissatisfied with the decision of the trial judge in the High Court the constitutional right of appeal to an intermediate appellate body (the Court of Appeal) and thence to the final appellate body (the Federal Court). Article 121(2)(a) of the Federal Constitution clearly confers on the Federal Court the "jurisdiction to determine appeals from decisions of the Court of Appeal, of the High Court or a judge thereof', qualified by art. 128(3) that such jurisdiction shall be as provided by federal law. Article 128(3) is the enabling provision in the Federal Constitution that allows federal law to regulate the exercise of the jurisdiction of the Federal Court conferred on it by art. 121(2)(a), ie, to allow federal law to be made to provide for rules, procedure or conditions (including the question of leave, etc) to ensure the proper exercise of the Federal Court's jurisdiction. Article 128(3) cannot be interpreted as allowing federal law to fetter the jurisdiction of the Federal Court to hear any appeal on the merits from the Court of Appeal emanating from a decision of the High Court or a judge thereof. A harmonious interpretation of art. 128(3) *vis-a-vis* art. 121(2)(a) will promote the purpose or object of the law providing for a three-tiered pyramidal judicial system of "one trial + 2 appeals" as envisaged in the Federal Constitution and structured accordingly in the Courts of Judicature Act 1964.

In our present case, leave to appeal to the Federal Court, based on the two questions posed, was granted by the Federal Court on 17 April 2001. This appeal was heard by us in open court on 23 July 2001. To me, leave was correctly given and this appeal case, MPRS No. 02-8-2001(W), is properly brought before the Federal Court.

The duty of the Federal Court, as the apex court, to ensure that justice is done far outweighs any procedural technicality preventing it from being done. When a case is brought before the Federal Court, the court is seised of jurisdiction

over the case. So seised, the Federal Court must decide the case in the interest of justice, to redress the wrong and uphold the right, uninhibited by the technicalities strewn in its path.

To sum up, as hereinbefore stated, I am answering the 2nd Question in the positive. In the circumstances of this case, I would allow the appeal with costs and hereby order that the case be remitted to the Court of Appeal for re-hearing on the merits, whether before the same or different panel of judges as the President of the Court of Appeal so direct.